

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, and Stephen
W. Law, D.O., Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, ... Defendants,

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

And Of Whom Stephen W. Law, D.O. is, ... Respondent/Appellant,

And Of Whom Dr. Richard Young, M.D., and
Grand Strand Urology, LLP, are, ... Respondents.

RECORD ON APPEAL – VOLUME I

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SC Court of Appeals

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**RECORD ON APPEAL
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FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

Plaintiff,

vs.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, and
Stephen W. Law, D.O.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.: 08-CP-26-9047
08-CP-26-9368

ORDER DENYING DEFENDANT HOSPITAL'S
POST TRIAL MOTIONS

FILED
JUN 24 PM 3:15
CLERK OF COURT
FIFTEENTH JUDICIAL CIRCUIT
HORRY COUNTY

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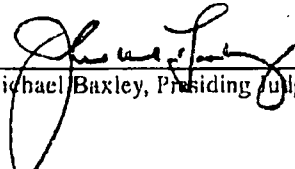
Defendant Grand Strand Regional Medical Center, LLC moves pursuant to Rules 50 and 59, SCRPC, for judgment notwithstanding the verdict, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. This medical negligence case was tried before the Court May 24 through 28, 2010. The jury rendered a verdict in favor of the Plaintiff for \$3 million dollars actual damages, attributing to Defendant Hospital ninety (90%) percent comparative negligence. The Defendant Hospital claims that the jury verdict is excessive and cannot reasonably be based on the evidence submitted at trial. Further, Defendant states that the Court erred in excluding testimony of the decedent's husband's extra-marital affair some two years prior to decedent's death, his subsequent remarriage after decedent's death, and for limiting testimony of the decedent's mother, stepfather, and brother, all appearing for the Defendants.

Prior to trial, the Court conducted hearings on Plaintiff's motion in limine to exclude the testimony of the Plaintiff's extramarital affair and subsequent remarriage. The Court ruled in favor of the Plaintiff because the remarriage of the Plaintiff after his wife's death is clearly excluded under longstanding South Carolina law and has no relevance to the matter at issue in the trial. Wooten v. Amspacher, 307 S.E.2d 232 (1983). Plaintiff's extramarital affair has no bearing on whether the Defendants' negligence was the cause of decedent's death, which was the real battleground of this case, and thus was far more prejudicial than probative. The Court limited the testimony of the decedent's family at trial because it was duplicative, in an already lengthy trial, and did not go to the cause of the decedent's death. The verdict and its amount were not contrary to the evidence presented at trial, which involved the unexpected death of an otherwise healthy twenty-five year old. The jury in this case deliberated for approximately twelve hours over two days, and this Court is disinclined to disturb their findings.

After further review of the evidence presented at trial, the in limine motions, the jury charges, and Defendant Hospital's post trial motions, the Defendant Hospital's post trial motions are hereby **DENIED**, and the jury verdict confirmed.

IT IS SO ORDERED.

June 23, 2010


J. Michael Baxley, Presiding Judge

This judgment was entered on the _____ day of June 2010, and a copy mailed first class this _____ day of June, 2010 to attorneys of record or to parties as follows:

Attorney for Plaintiff

Ruskin Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201

Attorney for Defendant Hospital

Monteith P. Todd, Esquire
Sowell, Gray, Stepp, & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Randolph L. Lee, Esquire
Bappen Lee
8000 Western Parkway, Suite 340
Cary, NC 27513

Attorney for Defendant Dr. Law

J. Boone Aiken, III, Esquire
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P.O. Drawer 1931
Florence, SC 29503

CLERK OF COURT



Recd 7/12/10
Lee 5547/1549

State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550-4311
TELEPHONE: (843) 383-4114
FAX: (843) 383-4116
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June 23, 2010

Honorable Melanie Huggins-Ward
Horry County Clerk of Court
Post Office Box 677
Conway, SC 29528

Re: Fay v. Grand Strand Regional Medical Center, et al
Case Numbers: 2008-CP-26-9047, 2008-CP-26-9368

Dear Ms. Huggins-Ward:

Enclosed please find an Order Denying Defendant Law's Post Trial Motions and an Order Denying Defendant Hospital's Post Trial Motions that have been signed in the above listed cases. Please file these Orders and serve clocked copy on the parties. Thank you for your attention to this matter.

Sincerely yours,


J. Michael Baxley
JMB/jlc

Enclosures

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JUL 24 PM 3:15
HONORABLE MELANIE HUGGINS-WARD
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

Plaintiff,

vs.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, Stephen
W. Law, D.O.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.: 08-CP-26-9047
08-CP-26-9368

ORDER DENYING DEFENDANT LAW'S
POST TRIAL MOTIONS

FILED
JAN 24 PM 3:15
CLERK OF COURT
GRAND STRAND REGIONAL MEDICAL CENTER

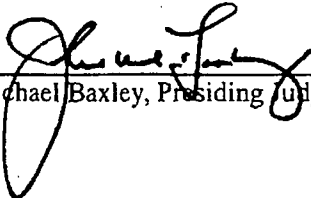
gms
Defendant Dr. Stephen W. Law moves for judgment notwithstanding the verdict, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. This medical negligence case was tried before the Court May 24 through 28, 2010. The jury rendered a verdict in favor of the Plaintiff for \$3 million dollars actual damages, attributing to Defendant Law six (6%) percent comparative negligence. The Defendant Dr. Law claims that the jury verdict is excessive and cannot reasonably be based on the evidence submitted at trial. Further, Defendant states that the Court erred in excluding testimony of the decedent's husband's extra-marital affair some two years prior to decedent's death, his subsequent remarriage after decedent's death, and for limiting testimony of the decedent's mother, stepfather, and brother, all appearing for the Defendants.

Prior to trial, the Court conducted hearings on Plaintiff's motion in limine to exclude the testimony of the Plaintiff's extramarital affair and subsequent remarriage. The Court ruled in favor of the Plaintiff because the remarriage of the Plaintiff after his wife's death is clearly excluded under longstanding South Carolina law and has no relevance to the matter at issue in the trial. Wooten v. Amspacher, 307 S.E.2d 232 (1983). Plaintiff's extramarital affair has no bearing on whether the Defendants' negligence was the cause of decedent's death, which was the real battleground of this case, and thus was far more prejudicial than probative. The Court limited the testimony of the decedent's family at trial because it was duplicative, in an already lengthy trial, and did not go to the cause of the decedent's death. The verdict and its amount were not contrary to the evidence presented at trial, which involved the unexpected death of an otherwise healthy twenty-five year old. The jury in this case deliberated for approximately twelve hours over two days, and this Court is disinclined to disturb their findings.

After further review of the evidence presented at trial, the in limine motions, the jury charges, and Defendant Hospital's post trial motions, the Defendant Hospital's post trial motions are hereby **DENIED**, and the jury verdict confirmed.

IT IS SO ORDERED.

June 23, 2010



J. Michael Baxley, Presiding Judge

This judgment was entered on the _____ day of June 2010, and a copy mailed first class this _____ day of June, 2010 to attorneys of record or to parties as follows:

Attorney for Plaintiff

Ruskin Foster, Esquire
Mike Kelly Law Group, LLC
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Attorney for Defendant Hosptial

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Columbia, SC 29211

Randolph L. Lee, Esquire
Bappen Lee
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Attorney for Defendant Dr. Law

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Florence, SC 29503

CLERK OF COURT



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
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June 23, 2010

Honorable Melanie Huggins-Ward
Horry County Clerk of Court
Post Office Box 677
Conway, SC 29528

Re: Fay v. Grand Strand Regional Medical Center, et al
Case Numbers: 2008-CP-26-9047, 2008-CP-26-9368

Dear Ms. Huggins-Ward:

Enclosed please find an Order Denying Defendant Law's Post Trial Motions and an Order Denying Defendant Hospital's Post Trial Motions that have been signed in the above listed cases. Please file these Orders and serve clocked copy on the parties. Thank you for your attention to this matter.

Sincerely yours,


J. Michael Baxley
JMB/jlc

Enclosures

FILED
HARRIS COUNTY
JUL 24 PM 3:15
MELANIE HUGGINS-WARD
CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

Plaintiff,

vs.

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, and
Stephen W. Law, D.O.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.: 08-CP-26-9047
08-CP-26-9368

ORDER DENYING DEFENDANT HOSPITAL'S
POST TRIAL MOTIONS

FILED
COUNTY
JUN 24 PM 3:15
CLERK OF COURT
SHELLE HIGGINS-WARD

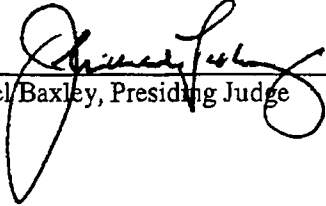
JMB
Defendant Grand Strand Regional Medical Center, LLC moves pursuant to Rules 50 and 59, SCRPC, for judgment notwithstanding the verdict, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. This medical negligence case was tried before the Court May 24 through 28, 2010. The jury rendered a verdict in favor of the Plaintiff for \$3 million dollars actual damages, attributing to Defendant Hospital ninety (90%) percent comparative negligence. The Defendant Hospital claims that the jury verdict is excessive and cannot reasonably be based on the evidence submitted at trial. Further, Defendant states that the Court erred in excluding testimony of the decedent's husband's extra-marital affair some two years prior to decedent's death, his subsequent remarriage after decedent's death, and for limiting testimony of the decedent's mother, stepfather, and brother, all appearing for the Defendants.

Prior to trial, the Court conducted hearings on Plaintiff's motion in limine to exclude the testimony of the Plaintiff's extramarital affair and subsequent remarriage. The Court ruled in favor of the Plaintiff because the remarriage of the Plaintiff after his wife's death is clearly excluded under longstanding South Carolina law and has no relevance to the matter at issue in the trial. Wooten v. Amspacher, 307 S.E.2d 232 (1983). Plaintiff's extramarital affair has no bearing on whether the Defendants' negligence was the cause of decedent's death, which was the real battleground of this case, and thus was far more prejudicial than probative. The Court limited the testimony of the decedent's family at trial because it was duplicative, in an already lengthy trial, and did not go to the cause of the decedent's death. The verdict and its amount were not contrary to the evidence presented at trial, which involved the unexpected death of an otherwise healthy twenty-five year old. The jury in this case deliberated for approximately twelve hours over two days, and this Court is disinclined to disturb their findings.

After further review of the evidence presented at trial, the in limine motions, the jury charges, and Defendant Law's post trial motions, the Defendant Law's post trial motions are hereby **DENIED**, and the jury verdict confirmed.

IT IS SO ORDERED.

June 23, 2010


J. Michael Baxley, Presiding Judge

This judgment was entered on the _____ day of June 2010, and a copy mailed first class this _____ day of June, 2010 to attorneys of record or to parties as follows:

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Attorney for Defendant Dr. Law

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Florence, SC 29503

CLERK OF COURT

COPY

DLSCN 08/22/11

FORM 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2008-CP-26-09047; 09368
Sean D. Fay, as Personal Representative for the Estate of Kelly L. Fay, Deceased,	)	
Plaintiff,	)	
v.	)	ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT LAW'S MOTION FOR RECONSIDERATION OF DENIAL OF POST TRIAL MOTIONS
Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center; Stephen W. Law, D.O.,	)	(Order directing Clerk to amend judgment)
Defendants.	)	

CLERK OF COURT
AUG 17 2010
FAY FOR

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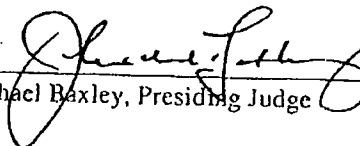
This matter is before the Court on the motion of Defendant Dr. Stephen W. Law for reconsideration of a previous Order denying Defendant Law's post-trial motions, signed June 23, 2010. In his motion, Defendant Law asks the Court to specifically address each of the issues set forth in Defendant Law's post-trial motions," stating that the Court has failed to address these issues, specifically: (1) Defendant Law's JNOV motion and his position as to the only reasonable inferences that can be drawn from the evidence; (2) Defendant Law's motion for a new trial and the exclusion of certain evidence; (3) Defendant Law's motion for relief under the Thirteenth Juror doctrine as to the excessiveness of the verdict; and, (4) Defendant Law's motion for new trial nisi remittitur.

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 the post-trial motions.

Defendant Law also moves this Court to reform the verdict based upon the percentages of negligence assigned to the Defendants by the jury. This issue was not addressed in the Court's previous Order denying post-trial motions. Because, the "jury's determination of damages is entitled to substantial deference" [*McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995)], the Court will grant Defendant Law's Motion that the judgment be enrolled using the percentage of fault as found by the jury. The Clerk shall amend the judgment against Dr. Law and enroll judgment at six percent (6%) of the total damages awarded by the jury, the sum of one hundred eighty thousand (\$180,000.00) dollars. Accordingly, the Clerk shall amend the judgment against Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center and enroll that judgment at ninety (90%) percent of the total damages awarded by the jury, the sum of two million seven hundred thousand (\$2,700,000.00) dollars. These amendments shall be entered *nunc pro tunc*, and interest shall run from the original date of judgment on the amended judgment amount only. Notwithstanding the law of joint and several liability in effect at the time of the incident which gave rise to this claim, the parties agreed to submit the matter to the jury requesting a finding of specific percentages of negligence, agreeing to be bound thereby, and the Court enrolls the verdict accordingly.

DLSCN 09/23/11

IT IS SO ORDERED.


J. Michael Baxley, Presiding Judge

August 15, 2011
Hartsville, South Carolina

This judgment was entered on the 17th day of August 2011, and a copy mailed first class this 19th day of August, 2011 to attorneys of record or to parties as follows:

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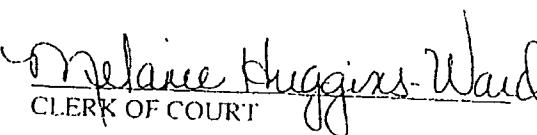
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Andrew F. Lindemann, Esquire
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Columbia, SC 29202


CLERK OF COURT

FORM 4

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	2008-CP-26-09047; 09368
Sean D. Fay, as Personal)	
Representative for the Estate of)	
Kelly L. Fay, Deceased.)	
Plaintiff.)	
vs.)	ORDER VACATING THAT PORTION OF
Grand Strand Regional Medical)	THE FORM 4 ORDER OF 8/15/11
Center, LLC, d/b/a South Strand)	GRANTING IN PART
Ambulatory Care Center, Stephen)	DEFENDANT LAW'S MOTION FOR
W. Law, D.O.,)	RECONSIDERATION OF DENIAL OF POST
Defendants.)	TRIAL MOTIONS
	AND NOW DENYING THOSE MOTIONS IN FULL
	(Instructing Clerk to Reinstate Original Judgment).

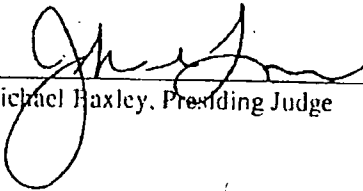
This Court issued an Order dated August 15, 2011 that partially granted a motion to reconsider this Court's original Order denying all of Defendant Law's post-trial motions. This August 15 Order stated "[n]otwithstanding the law of joint and several liability in effect at the time of the incident which gave rise to this claim, the parties agreed to submit the matter to the jury requesting a finding of specific percentages of negligence, agreeing to be bound thereby." Accordingly, in the previous Order, the Court directed the Clerk "to amend the judgment against Dr. Law and enroll judgment at six percent (6%) of the total damages awarded by the jury, the sum of one hundred eighty thousand (\$180,000) dollars, and to amend the judgment against Grand Strand Regional Medical Center, LLC, d/b/a South Strand Ambulatory Care Center and enroll that judgment at ninety (90%) percent of the total damages awarded by the jury, the sum of two million seven hundred thousand (\$2,700,000) dollars."

The Court is now aware that the previous Order was incorrect when it stated that the parties agreed to be bound by the allocation of specific percentages of negligence found by the jury. The Court recognized its mistake after conducting a phone conference involving counsel for all the parties. Therefore, there was no basis for the Court to direct the Clerk to reform the verdict based upon these percentages of negligence and to enroll the verdict accordingly. The law in effect at the time of the incident that gave rise to this suit requires joint and several liability, and in absence of agreement to the contrary, this Court must follow that law.

As a result, the Court now rescinds that portion of its previous Order reforming the verdict, and now Orders that the original jury verdict be re-enrolled, *nunc pro tunc*, against both Defendants jointly and severally. All other portions of the previous Order remain in effect. 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. This case is now ended at the circuit level.

IT IS SO ORDERED.

August 24, 2011


J. Michael Haxley, Presiding Judge

This judgment was entered on the 26 day of August 2011, and a copy mailed first class this 30th day of August, 2011 to attorneys of record or to parties as follows:

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Ruskin Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201

John S. Nichols, Esquire
Bluestein, Nichols, Thompson, Delgado
1614 Taylor Street
Columbia, SC 29202

Attorney for Defendant Hospital

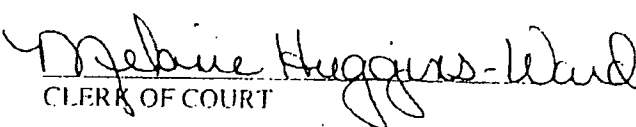
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Sowell, Gray, Stepp, & Lafitte, LLC
P.O. Box 11449
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Randolph L. Lee, Esquire
Bappen Lee
8000 Western Parkway, Suite 340
Cary, NC 27513

Attorney for Defendant Dr. Law

J. Boone Aiken, III, Esquire
Aiken, Bridges, Elliott, Tyler, & Saleeby, PA
P.O. Drawer 1931
Florence, SC 29503

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202


CLERK OF COURT

The South Carolina Court of Appeals

Sean 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 is

Appellant/Respondent,

And Of Whom Stephen W. Law, D.O.,
is

Respondent/Appellant,

And Of Whom Dr. Richard Young,
M.D., and Grand Strand Urology, LLP,
are

Respondents.

The Honorable J. Michael Baxley
Horry County

Trial Court Case Nos. 2008-CP-26-9047 and 2008-CP-26-9368

ORDER

After the death of his twenty-five-year-old wife from complications arising from a kidney stone, Respondent/Appellant Sean Fay, as the personal representative of Kelly Fay's estate, brought a medical negligence action against Grand Strand Regional Medical Center (the Hospital); Stephen W. Law, D.O.; Dr. Richard Young, M.D.; and Grand Strand Urology, LLP. At the close of evidence, Dr. Young and his practice, Grand Strand Urology, LLP, moved for a

directed verdict, which the trial court granted by an oral ruling on May 26, 2010. The jury began deliberations on May 27, 2010, and returned a verdict on the following day finding the Hospital, Dr. Law, and Respondent/Appellant Fay negligent. The jury determined the portion of each party's fault as follows: the Hospital, 90%; Dr. Law, 6%; and Respondent/Appellant, 4%. The jury found Kelly Fay suffered \$3,000,000.00 in actual damages. The trial court filed a Form 4 order on May 28, 2010, indicating a final judgment and jury verdict in favor of Respondent/Appellant Fay in the amount of \$2,880,000.00.

Dr. Law filed timely post-trial motions for judgment notwithstanding the verdict (JNOV), a new trial absolute, a new trial nisi remittitur, and to have the judgment enrolled using the percentages allocated by the jury. The trial court denied those motions in an order served on June 23, 2010, and filed on June 24, 2010. Dr. Law filed a motion to alter or amend the judgment pursuant to Rule 59, SCRCP, on July 21, 2010, asserting the trial court failed to address (1) the basis for his JNOV motion, (2), certain portions of his motion for a new trial, (3) his motion for a new trial nisi remittitur, and (4) his motion to have the judgment enrolled using the percentages of fault allocated by the jury. The trial court ultimately denied Dr. Law's Rule 59(e) motion in an order dated August 26, 2011.¹

Dr. Law filed and served his notice of appeal on September 23, 2011. Respondent/Appellant Fay filed a motion to dismiss Dr. Law's appeal, arguing that, because his Rule 59(e) motion was a successive post-trial motion raising the same issues as his original post-trial motions, it did not toll the time for filing an appeal, and his notice of appeal was untimely.

¹ In its initial order filed on August 17, 2011, the trial court granted Dr. Law's Rule 59(e) motion in part; however, after Respondent/Appellant Fay and the Hospital filed motions to reconsider the order, the trial court vacated the portion of the order granting in part Dr. Law's Rule 59(e) motion.

Rule 203(b) of the South Carolina Appellate Court Rules requires a notice of appeal to "be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." The time for filing an appeal is tolled "for all parties" by a timely motion for JNOV, motion to alter or amend the judgment, or motion for a new trial. Rule 203(b), SCACR. Generally, "a party is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). An exception to the rule exists, however, "when a party-instead of serving a notice of appeal-recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion." Id. at 20, 602 S.E.2d at 778.

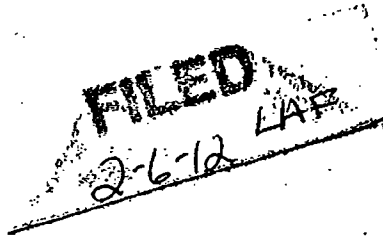
In the instant case, Dr. Law did not merely recaption his JNOV/new trial motions and resubmit them as an identical Rule 59(e) motion. Instead, his Rule 59(e) motion was specifically directed toward perceived deficiencies in the trial court's order ruling on his JNOV/new trial motions. The fact that his Rule 59(e) motion addressed the same issues as his JNOV/new trial motions is to be expected, and the motion was not "virtually identical" to his JNOV/new trial motions such that it would fail to toll the time for filing an appeal. See id. at 21, 602 S.E.2d at 778-79 ("[A] party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented."). Accordingly, because Dr. Law served his notice of appeal within thirty days of the trial court's final order ruling on his Rule 59(e) motion, his appeal was timely, and Respondent/Appellant Fay's motion to dismiss is denied.

IT IS SO ORDERED.

Paul E. Short, Jr.

Columbia, South Carolina

cc: Ruskin C. Foster, Esquire
John S. Nichols, Esquire
Andrew F. Lindermann, Esquire
J. Boone Aiken, III, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Monteith P. Todd, Esquire
Randolph L. Lee, Esquire
Marian W. Scalise, Esquire
Lydia L. Magee, Esquire



The South Carolina Court of Appeals

Sean 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 is

Appellant/Respondent,

And Of Whom Stephen W. Law, D.O.,
is

Respondent/Appellant,

And Of Whom Dr. Richard Young,
M.D., and Grand Strand Urology, LLP,
are

Respondents.

The Honorable J. Michael Baxley
Horry County

Trial Court Case Nos. 2008-CP-26-9047 and 2008-CP-26-9368

ORDER

This matter is before the court on Respondents' motion to dismiss Respondent/Appellant's appeal as untimely. After careful consideration of Respondents' motion to dismiss and the return and reply, we deny Respondents' motion to dismiss without prejudice and request that the parties address the issue of the timeliness of Respondent/Appellant Sean Fay's appeal as the first issue in their briefs.

IT IS SO ORDERED.

Paul G. Short, Jr.

Columbia, South Carolina

cc: Ruskin C. Foster, Esquire
John S. Nichols, Esquire
Andrew F. Lindermann, Esquire
J. Boone Aiken, III, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Monteith P. Todd, Esquire
Randolph L. Lee, Esquire
Marian W. Scalise, Esquire
Lydia L. Magee, Esquire

FILED
12/5/11 *VF*

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-26-9047

Sean D. Fay

Grand Strand Regional

VS.

Medical Center, et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 12(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

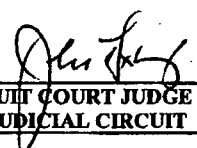
FILED
HORRY COUNTY
2010 MAY 28 PM 12:36
CLERK OF COURT
DELANE HUGGINS-WARD

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

We, the Jury, find in favor of the Plaintiff against the Defendants in the amount of Two Million Eight Hundred Eighty Dollars (2,880,000.00)

Dated at Conway, South Carolina, this 28th day of May 2010.


CIRCUIT COURT JUDGE
15TH JUDICIAL CIRCUIT

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Ruskin C. Foster

Marian W. Scalise

Monteith Powell

J. Boone Aiken, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

FOR THE FIFTEENTH JUDICIAL CIRCUIT

Sean D. Fay, as Personal
Representative for the Estate of
Kelly L. Fay, Deceased,

DOCKET NO.: 08-CP-26-9047
08-CP-26-9368

Plaintiff,

vs.

VERDICT

Grand Strand Regional Medical
Center, LLC, d/b/a South Strand
Ambulatory Care Center, Stephen
W. Law, D.O.,

Defendants.

1. a. Was the Defendant Grand Strand Regional Medical Center, LLC negligent?

☒ YES

☐ NO (Go to Question 2, do not answer 1 b)

- b. Was Defendant Grand Strand Regional Medical Center, LLC's negligence a proximate cause of the Plaintiff's injuries?

☒ YES

☐ NO

2. a. Was the Defendant Dr. Stephen W. Law negligent?

☒ YES

☐ NO (Do not answer 2 b)

- b. Was Defendant Dr. Stephen W. Law's negligence a proximate cause of the Plaintiff's injuries?

☒ YES

☐ NO

If you determined that neither of the Defendants were negligent or that the negligence of neither of the Defendants proximately caused the Plaintiff's injury, then you may stop your deliberations and return your verdict.

3. Was the Plaintiff negligent?

☒ YES

☐ NO (Go to Question 7)

4. Was the Plaintiff's negligence a proximate cause of the Plaintiff's own injuries?

☒ YES

☐ NO

FILED
HORRY COUNTY
2018 MAY 28 PM 12:36
MELANIE HUGGINS-WARD
CLERK OF COURT

<u>4</u> %	Plaintiff	} Grand Strand - 90%
<u>96</u> %	Defendants	
<u>100</u> %	Total	

6. Was the Plaintiffs' negligence greater than fifty percent?
 _____ YES (Stop deliberations)
 X NO (Go to Question 7)

\$ 3 million Actual Damages

Michael A. Waldowski, Foreperson
May 27, 2010

Verdict amount for Plaintiff to be entered:
\$2,880,000

John F. Kelly
Circuit Judge
5/28/10

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.:

Sean D. Fay, as Personal)
Representative for the Estate of)
Kelly L. Fay, Deceased,)

Plaintiff,)

vs.)

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane Doe,)
an unidentified nurse employed with)
Grand Strand Regional Medical)
Center, LLC, Stephen W. Law, D.O.,)
Carolinahealth Specialists, Dr.)
Richard Young, M.D. and Grand)
Strand Urology, LLP,)
Defendants.)

SUMMONS
Wrongful Death Action
Medical Malpractice
(Jury Trial Demanded)

HORRY COUNTY
01 JAN 27 PM 3:42
JEANIE J. ROBERTS
CLERK OF COURT

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to answer the Complaint in this action. A copy of the Complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 1414 Lady Street, P.O. Drawer 11209, Columbia, South Carolina 29211.

You are hereby given notice further that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

McCutchen Blanton Johnson & Barnett, L.L.P.

Ruskin C. Foster
William E. Hopkins, Jr.
1414 Lady Street
P.O. Drawer 11209
Columbia SC 29211-1209
(803) 799-9791
ATTORNEY FOR PLAINTIFF

January 27, 2004

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.:

Sean D. Fay, as Personal)
Representative for the Estate of)
Kelly L. Fay, Deceased,)

Plaintiff,)

vs.)

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane Doe)
and unidentified nurse employed)
with Grand Strand Regional Medical)
Center, LLC, Stephen W. Law, D.O.,)
Carolinahealth Specialists, Dr.)
Richard Young, M.D. and Grand)
Strand Urology, LLP,)
Defendants.)

COMPLAINT
Wrongful Death

(Jury Trial Demanded)

HORRY COUNTY
04 JAN 27 PM 3:42
JEANNE J. ROBERTS
CLERK OF COURT

The Plaintiff, complaining of the Defendants would respectfully show unto this
Honorable Court:

JURISDICTION

1. Upon information and belief, that Plaintiff, Defendant Law, Defendant Young and Defendant Jane Doe are citizens and residents of the County of Horry, State of South Carolina.
2. That Defendant Grand Strand Regional Medical Center, LLC (GSRMC) d/b/a South Strand Ambulatory Care Center is a corporation organized under the law of the State of South Carolina which owns property and transacts business in the County of Horry, State of South Carolina. At all times mentioned herein, Defendant Jane Doe and Defendant Stephen W. Law, D.O. were agents and/or employees of Grand Strand Regional Medical Center, LLC, and as such, Defendant Grand Strand Regional Medical Center, LLC is vicariously liable for the

such, Defendant Grand Strand Regional Medical Center, LLC is vicariously liable for the negligence of Defendant Jane Doe and Defendant Stephen W. Law, D.O..

3. The Defendant Carolina Health Specialists is a professional association which owns property and transacts business in Horry County, South Carolina. At all times mentioned herein, Defendant Stephen W. Law, D.O. was an agent and employee of Carolina Health Specialists and as such, Defendant Carolina Health Specialists is vicariously liable for the negligence of Defendant Stephen W. Law, D.O..

4. Defendant Grand Strand Urology, P.A. is a professional association which owns property and transacts business in Horry County, South Carolina. At all times mentioned herein, Defendant Richard Young, M.D. was an agent and employee of Grand Strand Urology, P.A. and as such, Defendant Grand Strand Urology, P.A. is vicariously liable for the negligence of Defendant Richard Young.

5. That at all times enumerated herein, there existed a doctor/patient relationship between the Plaintiff and Defendants.

6. That this action is brought pursuant to South Carolina Code Ann. §15-51-10 et seq. as amended, in regards to the wrongful death of Kelly L. Fay. Her statutory beneficiary under § 15-51-20 of the South Carolina Code of Laws is Sean D. Fay.

7. That on January 26, 2002, Plaintiff did present at GSRMC emergency room (also known as South Strand Ambulatory Care Center) complaining of severe flank pain radiating around to her right periumbilical area as well as nausea and vomiting.

8. Plaintiff's past medical history was significant for kidney stones.

9. Because of the above, which raised the suspicion of a kidney stone, the emergency

room osteopath ordered an abdominal x-ray which indicated that Plaintiff had a large, irregularly shaped kidney stone measuring 8 mm by 4 mm. Subsequently, the emergency room osteopath ordered a CT scan of the abdomen without contrast, which showed the presence of a right hydronephrosis or dilation of the pelvis and calice associated with the stone. This CT scan also showed that the stone was located within the proximal region of the ureter. Further, the same CT scan indicated pyelosinus extravasation of urine. In short, the CT scan showed a right kidney stone and dilation and extravasation of urine suggesting that the stone was obstructing. The emergency room osteopath was made aware of these findings by the radiologist, John J. Chomyn, M.D. prior to Plaintiff's discharge.

10. Subsequent to the above mentioned CT scan, a CT scan of Plaintiff's pelvis was performed where, again, the radiologist diagnosed an obstructing kidney stone.

11. Defendant Law ordered 30 milligrams of intravenous Toradol and 12.5 milligrams of intravenous Phenergan as well as 1 milligram of intravenous Dilaudid in the emergency department, which was administered by the emergency department staff.

12. Defendant Young, the on-call urologist was consulted by Defendant Law and Defendant Young asked if he could see the patient on Monday. Defendant Young failed to even present at the emergency department to examine the patient or to review her test results. An appointment was to be made with Defendant Young for the following Monday and Plaintiff was sent home without an infection having been ruled out and with no antibiotics having been given or prescribed.

13. Furthermore, Defendant Law prescribed pain medication in the form of Oxycodone/APAP 5-500 mg..

14. Rather than having Plaintiff admitted to the hospital for in-patient care and management, Defendant Law sent Plaintiff home even though she was febrile at the time of discharge.

15. Her temperature remained virtually the same the rest of the day (Saturday) and on the next day (Sunday). However, on Sunday, Plaintiff began having chills which lasted roughly ten minutes. The chills resurfaced about an hour or so later and, as instructed by GSRMC, Plaintiff's husband called the emergency department for advice. Plaintiff's husband asked to speak to the doctor on duty and believes he was transferred to an unidentified nurse instead (Jane Doe). He explained the situation to the GSRMC unidentified staff member and he was informed that she needed to drink plenty of water, take her pain medication and follow up with the urologist on Monday as planned.

16. On Monday morning, Plaintiff showered in preparation to visit the urologist. Upon telephoning the urologist's office, as instructed by GSRMC, to schedule the appointment with Defendant Young, his office explained he would not be able to squeeze her in until 3:00 p.m. that afternoon. Plaintiff's husband went to work at 9:30 a.m. with plans to return home around 2:00 p.m. to take Plaintiff to Defendant Young's office.

17. Upon Plaintiff's husband's arrival home at 2:00 p.m., he discovered her unconscious and on the couch. Plaintiff was moaning, gagging and seizing with a white foamy substance coming out of her mouth. Additionally, she had soiled herself and Plaintiff's husband immediately called for an ambulance.

18. Upon arrival at GSRMC's emergency room she was seen by Dr. Chi and her history of being treated at GSRMC was explained to him. While in a private waiting room with

some friends, Dr. Chi entered and asked Plaintiff's husband about her visit on Saturday and subsequently Defendant Law came in and apologized to Plaintiff's husband for Plaintiff's condition.

19. On January 28, 2002, Plaintiff presented to Dr. Chi with overwhelming sepsis and septic shock. Dr. Chi took immediate action, however, at that point, Plaintiff continued to deteriorate, suffering liver failure, respiratory failure, seizures and finally cardio-respiratory failure.

20. Several codes were called and attempts to resuscitate were initially successful, however, after the patient went into her final cardiac arrest, Dr. Chi was not able to resuscitate her.

21. Plaintiff was pronounced dead at 10:00 p.m. on January 28, 2002, approximately 48 hours after her presentment at and treatment by the GSRMC staff, Defendants Law and Young and after being discharged rather than admitted for inpatient management, observation and care.

22. Defendants named hereinabove had a duty to treat Plaintiff at a level that met or exceeded the nationally recognized standard of care, which was breached.

23. Defendants named hereinabove were negligent, grossly negligent, and reckless in their treatment of the Plaintiff and performed their duties towards Plaintiff in a manner well beneath the nationally recognized standard of care for the same or similar healthcare providers in the same or similar circumstances.

24. Defendants, individually and/or by and through their agents, employees, servants, representatives and/or partners, breached their duties in their care and treatment of Plaintiff in

one or more of the following particulars, acts or omissions:

- a. In failing to properly examine Plaintiff and/or order the appropriate diagnostic tests to discover any infection then existing in Plaintiff;
- b. In failing to properly examine, diagnose, treat and refer the patient and in failing to initially examine, diagnose, treat and refer the patient in a timely fashion;
- c. In failing to have the patient admitted to the hospital for inpatient management, observation and treatment;
- d. In failing to perform the appropriate blood tests even though two vials of blood were drawn from Plaintiff and never utilized in any fashion;
- e. In ignoring the clear and obvious results of radiological examinations and reports and their implications
- f. In failing to properly perform, administer, read and/or interpret the tests that were performed;
- g. In failing to order the necessary diagnostic tests given Plaintiff's complaints and physical condition;
- h. In advising Plaintiff's husband not to bring Plaintiff to the hospital on Sunday, January 27, 2002, the day before Plaintiff's death;
- i. In failing to personally examine, treat and admit Plaintiff on Saturday, January 26, 2002;
- j. In failing to exercise that degree or skill ordinarily used by physicians and/or healthcare providers used under the same or similar circumstances;

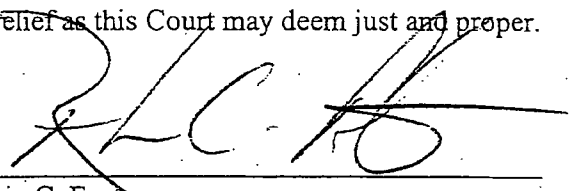
- k. Such additional and further particulars as it may be learned through discovery and/or proven at trial.

24. That as a direct and proximate result of the acts and/or omissions of Defendants set out here and above, Plaintiff's beneficiary has been made to suffer loss of consortium, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, the deprivation of the use of decedent's society, pecuniary loss, as well as medical and funeral expenses.

25. That because of the above, Plaintiff's beneficiary seeks judgment against Defendants and each of them for a reasonable amount of actual damages in addition to exemplary amount of punitive damages.

WHEREFORE, Plaintiff prays for judgement against Defendants in the following particulars to wit:

- a. A reasonable amount of actual damages;
- b. For an exemplary amount of punitive damages;
- c. For the costs and disbursements of this action;
- d. For such other and further relief as this Court may deem just and proper.



Ruskin C. Foster
William E. Hopkins, Jr.
McCutchen Blanton Johnson & Barnette, LLP
PO Box 11209
Columbia, South Carolina 29211-1209
(803) 799-9791
Attorney for Plaintiff

January 27, 2004

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Sean D. Fay, as Personal)
Representative for the Estate of)
Kelly L. Fay, Deceased,)

Plaintiff,)

vs.)

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane Doe,)
an unidentified nurse employed with)
Grand Strand Regional Medical)
Center, LLC, Stephen W. Law, D.O.,)
Carolinahealth Specialists, Dr.)
Richard Young, M.D. and Grand)
Strand Urology, LLP,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.:

SUMMONS
Survival Action
Medical Malpractice
(Jury Trial Demanded)

HORRY COUNTY
04 JAN 27 PM 3:40
JEANNE J. ROBERTS
CLERK OF COURT

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to answer the Complaint in this action. A copy of the Complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. You answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service at 1414 Lady Street, P.O. Drawer 11209, Columbia, South Carolina 29211.

You are hereby given notice further that, if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the Complaint.

McCutchen Blanton Johnson & Barnette, LLP

Ruskin C. Foster
William E. Hopkins, Jr.
1414 Lady Street
P.O. Drawer 11209
Columbia SC 29211-1209
(803) 799-9791
ATTORNEY FOR PLAINTIFF

January 27, 2004

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

DOCKET NO.:

Sean D. Fay, as Personal)
Representative for the Estate of)
Kelly L. Fay, Deceased,)

Plaintiff,)

vs.)

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane Doe)
and unidentified nurse employed)
with Grand Strand Regional Medical)
Center, LLC, Stephen W. Law, D.O.,)
Carolinahealth Specialists, Dr.)
Richard Young, M.D. and Grand)
Strand Urology, LLP,)
Defendants.)

COMPLAINT
Survival Action

(Jury Trial Demanded)

HORRY COUNTY
04 JAN 27 PM 3:40
JEANNE J. ROBERTS
CLERK OF COURT

The Plaintiff, complaining of the Defendants would respectfully show unto this
Honorable Court:

JURISDICTION

1. Upon information and belief, that Plaintiff, Defendant Law, Defendant Young and Defendant Jane Doe are citizens and residents of the County of Horry, State of South Carolina.
2. That Defendant Grand Strand Regional Medical Center, LLC (GSRMC) d/b/a South Strand Ambulatory Care Center is a corporation organized under the law of the State of South Carolina which owns property and transacts business in the County of Horry, State of South Carolina. At all times mentioned herein, Defendant Jane Doe and Defendant Stephen W. Law, D.O. were agents and/or employees of Grand Strand Regional Medical Center, LLC, and as such, Defendant Grand Strand Regional Medical Center, LLC is vicariously liable for the

such, Defendant Grand Strand Regional Medical Center, LLC is vicariously liable for the negligence of Defendant Jane Doe and Defendant Stephen W. Law, D.O..

3. The Defendant Carolina Health Specialists is a professional association which owns property and transacts business in Horry County, South Carolina. At all times mentioned herein, Defendant Stephen W. Law, D.O. was an agent and employee of Carolina Health Specialists and as such, Defendant Carolina Health Specialists is vicariously liable for the negligence of Defendant Stephen W. Law, D.O..

4. Defendant Grand Strand Urology, P.A. is a professional association which owns property and transacts business in Horry County, South Carolina. At all times mentioned herein, Defendant Richard Young, M.D. was an agent and employee of Grand Strand Urology, P.A. and as such, Defendant Grand Strand Urology, P.A. is vicariously liable for the negligence of Defendant Richard Young.

5. That at all times enumerated herein, there existed a doctor/patient relationship between the Plaintiff and Defendants.

6. That this action is brought pursuant to South Carolina Code Ann. §15-51-10 et.seq. as amended, in regards to the wrongful death of Kelly L. Fay. Her statutory beneficiary under § 15-51-20 of the South Carolina Code of Laws is Sean D. Fay.

7. That on January 26, 2002, Plaintiff did present at GSRMC emergency room (also known as South Strand Ambulatory Care Center) complaining of severe flank pain radiating around to her right periumbilical area as well as nausea and vomiting.

8. Plaintiff's past medical history was significant for kidney stones.

9. Because of the above, which raised the suspicion of a kidney stone, the emergency

room osteopath ordered an abdominal x-ray which indicated that Plaintiff had a large, irregularly shaped kidney stone measuring 8 mm by 4 mm. Subsequently, the emergency room osteopath ordered a CT scan of the abdomen without contrast, which showed the presence of a right hydronephrosis or dilation of the pelvis and calice associated with the stone. This CT scan also showed that the stone was located within the proximal region of the ureter. Further, the same CT scan indicated pyelosinus extravasation of urine. In short, the CT scan showed a right kidney stone and dilation and extravasation of urine suggesting that the stone was obstructing. The emergency room osteopath was made aware of these findings by the radiologist, John J. Chomyn, M.D. prior to Plaintiff's discharge.

10. Subsequent to the above mentioned CT scan, a CT scan of Plaintiff's pelvis was performed where, again, the radiologist diagnosed an obstructing kidney stone.

11. Defendant Law ordered 30 milligrams of intravenous Toradol and 12.5 milligrams of intravenous Phenergan as well as 1 milligram of intravenous Dilaudid in the emergency department, which was administered by the emergency department staff.

12. Defendant Young, the on-call urologist was consulted by Defendant Law and Defendant Young asked if he could see the patient on Monday. Defendant Young failed to even present at the emergency department to examine the patient or to review her test results. An appointment was to be made with Defendant Young for the following Monday and Plaintiff was sent home without an infection having been ruled out and with no antibiotics having been given or prescribed.

13. Furthermore, Defendant Law prescribed pain medication in the form of Oxycodone/APAP 5-500 mg..

14. Rather than having Plaintiff admitted to the hospital for in-patient care and management, Defendant Law sent Plaintiff home even though she was febrile at the time of discharge.

15. Her temperature remained virtually the same the rest of the day (Saturday) and on the next day (Sunday). However, on Sunday, Plaintiff began having chills which lasted roughly ten minutes. The chills resurfaced about an hour or so later and, as instructed by GSRMC, Plaintiff's husband called the emergency department for advice. Plaintiff's husband asked to speak to the doctor on duty and believes he was transferred to an unidentified nurse instead (Jane Doe). He explained the situation to the GSRMC unidentified staff member and he was informed that she needed to drink plenty of water, take her pain medication and follow up with the urologist on Monday as planned.

16. On Monday morning, Plaintiff showered in preparation to visit the urologist. Upon telephoning the urologist's office, as instructed by GSRMC, to schedule the appointment with Defendant Young, his office explained he would not be able to squeeze her in until 3:00 p.m. that afternoon. Plaintiff's husband went to work at 9:30 a.m. with plans to return home around 2:00 p.m. to take Plaintiff to Defendant Young's office.

17. Upon Plaintiff's husband's arrival home at 2:00 p.m., he discovered her unconscious and on the couch. Plaintiff was moaning, gagging and seizing with a white foamy substance coming out of her mouth. Additionally, she had soiled herself and Plaintiff's husband immediately called for an ambulance.

18. Upon arrival at GSRMC's emergency room she was seen by Dr. Chi and her history of being treated at GSRMC was explained to him. While in a private waiting room with

some friends, Dr. Chi entered and asked Plaintiff's husband about her visit on Saturday and subsequently Defendant Law came in and apologized to Plaintiff's husband for Plaintiff's condition.

19. On January 28, 2002, Plaintiff presented to Dr. Chi with overwhelming sepsis and septic shock. Dr. Chi took immediate action, however, at that point, Plaintiff continued to deteriorate, suffering liver failure, respiratory failure, seizures and finally cardio-respiratory failure.

20. Several codes were called and attempts to resuscitate were initially successful, however, after the patient went into her final cardiac arrest, Dr. Chi was not able to resuscitate her.

21. Plaintiff was pronounced dead at 10:00 p.m. on January 28, 2002, approximately 48 hours after her presentment at and treatment by the GSRMC staff, Defendants Law and Young and after being discharged rather than admitted for inpatient management, observation and care.

22. Defendants named hereinabove had a duty to treat Plaintiff at a level that met or exceeded the nationally recognized standard of care, which was breached.

23. Defendants named hereinabove were negligent, grossly negligent, and reckless in their treatment of the Plaintiff and performed their duties towards Plaintiff in a manner well beneath the nationally recognized standard of care for the same or similar healthcare providers in the same or similar circumstances.

24. Defendants, individually and/or by and through their agents, employees, servants, representatives and/or partners, breached their duties in their care and treatment of Plaintiff in

one or more of the following particulars, acts or omissions:

- a. In failing to properly examine Plaintiff and/or order the appropriate diagnostic tests to discover any infection then existing in Plaintiff;
- b. In failing to properly examine, diagnose, treat and refer the patient and in failing to initially examine, diagnose, treat and refer the patient in a timely fashion;
- c. In failing to have the patient admitted to the hospital for inpatient management, observation and treatment;
- d. In failing to perform the appropriate blood tests even though two vials of blood were drawn from Plaintiff and never utilized in any fashion;
- e. In ignoring the clear and obvious results of radiological examinations and reports and their implications
- f. In failing to properly perform, administer, read and/or interpret the tests that were performed;
- g. In failing to order the necessary diagnostic tests given Plaintiff's complaints and physical condition;
- h. In advising Plaintiff's husband not to bring Plaintiff to the hospital on Sunday, January 27, 2002, the day before Plaintiff's death;
- i. In failing to personally examine, treat and admit Plaintiff on Saturday, January 26, 2002;
- j. In failing to exercise that degree or skill ordinarily used by physicians and/or healthcare providers used under the same or similar circumstances;

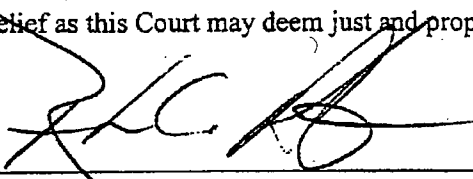
discovery and/or proven at trial.

25. That as a direct and proximate result of the acts and/or omissions of Defendants set out hereinabove, Plaintiff was made to suffer significant pain and suffering, mental anguish, psychological and emotional upset, loss of enjoyment of life, knowledge of impending death and ultimate death.

26. That because of the acts and/or omissions of Defendants as enumerated hereinabove which resulted both proximately and directly in the damages also set out above, the Plaintiffs personal representative seeks a reasonable amount of actual damages against the Defendants as well as an exemplary amount of punitive damages.

WHEREFORE, Plaintiff prays for judgement against Defendants in the following particulars to wit:

- a. A reasonable amount of actual damages;
- b. For an exemplary amount of punitive damages;
- c. For the costs and disbursements of this action;
- d. For such other and further relief as this Court may deem just and proper.



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William E. Hopkins, Jr.
McCutchen Blanton Johnson & Barnette, LLP
PO Box 11209
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(803) 799-9791
Attorney for Plaintiff

January 27, 2004

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURET OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2004-CP-26-481
(Wrongful Death)

Sean D. Fay, as Personal)
Representative of the Estate of)
Kelly L. Fay, Deceased,)
Plaintiff,)

vs.

**ANSWER OF THE DEFENDANT
STEPHEN W. LAW, D.O.**

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane)
Doe, an unidentified nurse)
employed with Grand Strand)
Regional Medical Center, LLC,)
Stephen W. Law, D.O.,)
Carolina Health Specialists,)
Richard Young, M.D., and Grand)
Strand Urology, LLP,)
Defendants.)

The Defendant, Stephen W. Law, D. O., answering the Complaint herein,
respectfully allege:

The Defendant, Stephen W. Law, D.O., denies each and every allegation
of the Plaintiff's Complaint not specifically addressed herein. This Defendant
alleges and says as follows:

FOR A FIRST DEFENSE

1. As to Paragraph 1, Dr. Law admits that Richard Young, M.D. is a
citizen and resident of Horry County, South Carolina; except as herein admitted,
the remaining allegations contained in Paragraph 1 of the Complaint are denied.
Dr. Law is a citizen and resident of the State of New Jersey.

2. As to Paragraph 2, Dr. Law admits, upon information and belief, the corporate status of South Strand Ambulatory Care Center; except as herein admitted, the remaining allegations contained in Paragraph 2 of the Complaint are denied.

3. As to Paragraph 3, Dr. Law admits that Carolina Health Specialists is a professional association; except as herein admitted, the remaining allegations contained in Paragraph 3 of the Complaint are denied.

4. As to Paragraph 4, Dr. Law is without information and belief as to the allegations contained in Paragraph 4 of the Complaint and therefore denies the same.

5. As to Paragraph 5, Dr. Law admits that on January 26, 2002, he examined the Plaintiff at GSRMC emergency department; except as herein admitted, the remaining allegations contained in Paragraph 5 of the Complaint are denied.

6. As to Paragraph 6, Dr. Law admits that the Plaintiff has alleged allegations pursuant to SC Code Ann. §15-51-10, et. seq. and §15-51-20; except as herein admitted, the remaining allegations contained in Paragraph 6 of the Complaint are denied.

7. As to Paragraph 7, Dr. Law admits that Kelly L. Fay presented to the emergency department at South Strand Ambulatory Care Center with complaints of right flank pain and described as radiating around to her right periumbilical area; except as herein admitted, the remaining allegations

contained in Paragraph 7 of the Complaint are denied. The Plaintiff complained of some mild nausea, but no vomiting.

8. As to Paragraph 8, Dr. Law admits that the Plaintiff had a past medical history of kidney stones; except as herein admitted, the remaining allegations contained in Paragraph 8 of the Complaint are denied.

9. As to Paragraph 9, the medical records speak for themselves and Dr. Law will offer testimony with regard to his treatment and impressions of the Plaintiff; except as herein admitted, the remaining allegations contained in Paragraph 9 of the Complaint are denied.

10. Dr. Law is without information and belief as to the allegations contained in Paragraph 10 of the Complaint and denies the same at this time.

11. As to Paragraph 11, Dr. Law admits that the Plaintiff had good pain relief with 30 mg of IV Toradol and 12.5 mg of Phenergan and 1 mg of IV Dilaudid; except as herein admitted, the remaining allegations contained in Paragraph 11 of the Complaint are denied.

12. As to Paragraph 12, Dr. Law admits that he discussed this case with Dr. Richard Young, on-call neurologist; except as herein admitted, the remaining allegations contained in Paragraph 12 of the Complaint are denied.

13. At this time, Dr. Law admits Paragraph 13, but reserves the right to amend this response after his review of the medical records.

14. Denies the allegations contained in Paragraph 14 of the Complaint.

15. Denies the allegations contained in Paragraph 15 of the Complaint.

16. Dr. Law is without information and belief as to the allegations contained in Paragraph 16 of the Complaint and therefore denies the same.

17. Dr. Law is without information and belief as to the allegations contained in Paragraph 17 of the Complaint and must deny the same at this time.

18. As to Paragraph 18, Dr. Law admits that the Plaintiff returned to the emergency room and saw a hospitalist in the emergency department; except as herein admitted the remaining allegations contained in Paragraph 18 of the Complaint are denied. Dr. Law did express concern to Mr. Fay with regard to his wife's condition.

19. Dr. Law is without information and belief as to the allegations contained in Paragraph 19 of the Complaint and must deny the same at this time.

20. As to Paragraph 20, Dr. Law admits that Kelly L. Fay died on January 28, 2002; except as herein admitted, the remaining allegations contained in Paragraph 20 of the Complaint are denied.

21. As to Paragraph 21, Dr. Law admits that Kelly L. Fay died on January 28, 2002; except as herein admitted, the remaining allegations contained in Paragraph 21 of the Complaint are denied.

22. Dr. Law admits that he had a duty to act within accepted standards of medical care; Dr. Law further states that he honored this duty; except as herein admitted, the remaining allegations contained in Paragraph 22 of the Complaint are denied.

23. Denies the allegations contained in Paragraph 23 of the Complaint.

24. Denies the allegations contained in Paragraph 24 of the Complaint.

25. Denies the allegations contained in Paragraph 25 of the Complaint (incorrectly designated as Paragraph 24).

26. Denies the allegations contained in Paragraph 26 of the Complaint (incorrectly designated as Paragraph 25).

FOR A SECOND DEFENSE

27. Stephen W. Law, D.O. honored his duty to exercise that degree of care and skill ordinarily exercised by his profession under similar conditions and in similar circumstances.

FOR A THIRD DEFENSE

28. Dr. Law alleges that any injuries and/or damages sustained by Plaintiff's decedent were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, pleads such natural disease process as a complete bar to this action.

FOR A FOURTH DEFENSE

29. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were due to the Plaintiff's and Plaintiff's decedent's negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions which combined and concurred with any negligence on the part of these Defendants, which is specifically denied, to produce such injury and damage, if any, and without which such injury and damage would not have occurred; such negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions on the part of the Plaintiff and Plaintiff's decedent and being more particularly set forth as follows:

- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
- b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital;
- c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
- d. in failing to contact a physician or return to the hospital when patient became worse;
- e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

all of which were the direct and proximate cause of any injury or damage sustained by the Plaintiff and Plaintiff's decedent, and this Defendant pleads such negligence, carelessness, recklessness, wantonness, willfulness and gross negligence on the part of the Plaintiff and Plaintiff's decedent and would ask that the Court compare the negligence of the Plaintiff and Plaintiff's decedent and this Defendant, which is specifically denied, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence was greater than the negligence, carelessness, recklessness, wantonness, willfulness and gross negligence of this Defendant, which is specifically denied, then the Plaintiff and Plaintiff's decedent should be totally barred from recovery, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence is equal to or less than the negligence of this Defendant, which is specifically denied, then the amount of recovery available to the Plaintiff and Plaintiff's decedent should be reduced by the percentage of the

Plaintiff's and Plaintiff's decedent's own negligence, carelessness, recklessness, wantonness, willfulness and gross negligence.

FOR A FIFTH DEFENSE

30. The Defendant, Stephen W. Law, D.O., alleges that an award of punitive damages in this case would violate the 5th, 6th and 14th amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution in that:

- a) The unfettered power to award punitive damages in any manner is wholly devoid of a meaningful standard and is inconsistent with due process guarantees; and,
- b) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness.

WHEREFORE, the Defendant, having fully answered the Plaintiff's Complaint, prays that said Complaint be dismissed with the costs and disbursements of this action.

By: _____

J. BOONE AIKEN, III

Aiken, Bridges, Nunn, Elliott & Tyler, P.A.

SC Bar # 307

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**ATTORNEYS FOR THE DEFENDANT
STEPHEN W. LAW, D.O.**

Florence, South Carolina
April 2, 2004.

(22108)

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2004-CP-26-480 (Survival)

Sean D. Fay, as Personal)
Representative of the Estate of)
Kelly L. Fay, Deceased,)
Plaintiff,)

vs.)

**ANSWER OF THE DEFENDANT
STEPHEN W. LAW, D.O.**

Grand Strand Regional Medical)
Center, LLC, d/b/a South Strand)
Ambulatory Care Center, Jane)
Doe, an unidentified nurse)
employed with Grand Strand)
Regional Medical Center, LLC,)
Stephen W. Law, D.O.,)
Carolina Health Specialists,)
Richard Young, M.D., and Grand)
Strand Urology, LLP,)
Defendants.)

The Defendant, Stephen W. Law, D. O., answering the Complaint herein,
respectfully allege:

The Defendant, Stephen W. Law, D.O. denies each and every allegation
of the Plaintiff's Complaint not specifically addressed herein. This Defendant
alleges and says as follows:

FOR A FIRST DEFENSE

1. As to Paragraph 1, Dr. Law admits that Richard Young, M.D. is a
citizen and resident of Horry County, South Carolina; except as herein admitted,
the remaining allegations contained in Paragraph 1 of the Complaint are denied.
Dr. Law is a citizen and resident of the State of New Jersey.

2. As to Paragraph 2, Dr. Law admits, upon information and belief, the corporate status of South Strand Ambulatory Care Center; except as herein admitted, the remaining allegations contained in Paragraph 2 of the Complaint are denied.

3. As to Paragraph 3, Dr. Law admits that Carolina Health Specialists is a professional association; except as herein admitted, the remaining allegations contained in Paragraph 3 of the Complaint are denied.

4. As to Paragraph 4, Dr. Law is without information and belief as to the allegations contained in Paragraph 4 of the Complaint and therefore denies the same.

5. As to Paragraph 5, Dr. Law admits that on January 26, 2002, he examined the Plaintiff at GSRMC emergency department; except as herein admitted, the remaining allegations contained in Paragraph 5 of the Complaint are denied.

6. As to Paragraph 6, Dr. Law admits that the Plaintiff has alleged allegations pursuant to SC Code Ann. §15-51-10, et. seq. and §15-51-20; except as herein admitted, the remaining allegations contained in Paragraph 6 of the Complaint are denied.

7. As to Paragraph 7, Dr. Law admits that Kelly L. Fay presented to the emergency department at South Strand Ambulatory Care Center with complaints of right flank pain and described as radiating around to her right periumbilical area; except as herein admitted, the remaining allegations

contained in Paragraph 7 of the Complaint are denied. The Plaintiff complained of some mild nausea, but no vomiting.

8. As to Paragraph 8, Dr. Law admits that the Plaintiff had a past medical history of kidney stones; except as herein admitted, the remaining allegations contained in Paragraph 8 of the Complaint are denied.

9. As to Paragraph 9, the medical records speak for themselves and Dr. Law will offer testimony with regard to his treatment and impressions of the Plaintiff; except as herein admitted, the remaining allegations contained in Paragraph 9 of the Complaint are denied.

10. Dr. Law is without information and belief as to the allegations contained in Paragraph 10 of the Complaint and denies the same at this time.

11. As to Paragraph 11, Dr. Law admits that the Plaintiff had good pain relief with 30 mg of IV Toradol and 12.5 mg of Phenergan and 1 mg of IV Dilaudid; except as herein admitted, the remaining allegations contained in Paragraph 11 of the Complaint are denied.

12. As to Paragraph 12, Dr. Law admits that he discussed this case with Dr. Richard Young, on-call neurologist; except as herein admitted, the remaining allegations contained in Paragraph 12 of the Complaint are denied.

13. At this time, Dr. Law admits Paragraph 13, but reserves the right to amend this response after his review of the medical records.

14. Denies the allegations contained in Paragraph 14 of the Complaint.

15. Denies the allegations contained in Paragraph 15 of the Complaint.

16. Dr. Law is without information and belief as to the allegations contained in Paragraph 16 of the Complaint and therefore denies the same.

17. Dr. Law is without information and belief as to the allegations contained in Paragraph 17 of the Complaint and must deny the same at this time.

18. As to Paragraph 18, Dr. Law admits that the Plaintiff returned to the emergency room and saw a hospitalist in the emergency department; except as herein admitted the remaining allegations contained in Paragraph 18 of the Complaint are denied. Dr. Law did express concern to Mr. Fay with regard to his wife's condition.

19. Dr. Law is without information and belief as to the allegations contained in Paragraph 19 of the Complaint and must deny the same at this time.

20. As to Paragraph 20, Dr. Law admits that Kelly L. Fay died on January 28, 2002; except as herein admitted, the remaining allegations contained in Paragraph 20 of the Complaint are denied.

21. As to Paragraph 21, Dr. Law admits that Kelly L. Fay died on January 28, 2002; except as herein admitted, the remaining allegations contained in Paragraph 21 of the Complaint are denied.

22. Dr. Law admits that he had a duty to act within accepted standards of medical care; Dr. Law further states that he honored this duty; except as herein admitted, the remaining allegations contained in Paragraph 22 of the Complaint are denied.

23. Denies the allegations contained in Paragraph 23 of the Complaint.

24. Denies the allegations contained in Paragraph 24 of the Complaint.

25. Denies the allegations contained in Paragraph 25 of the Complaint (incorrectly designated as Paragraph 24).

26. Denies the allegations contained in Paragraph 26 of the Complaint (incorrectly designated as Paragraph 25).

FOR A SECOND DEFENSE

27. Stephen W. Law, D.O. honored his duty to exercise that degree of care and skill ordinarily exercised by his profession under similar conditions and in similar circumstances.

FOR A THIRD DEFENSE

28. Dr. Law alleges that any injuries and/or damages sustained by Plaintiff's decedent were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, pleads such natural disease process as a complete bar to this action.

FOR A FOURTH DEFENSE

29. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were due to the Plaintiff's and Plaintiff's decedent's negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions which combined and concurred with any negligence on the part of these Defendants, which is specifically denied, to produce such injury and damage, if any, and without which such injury and damage would not have occurred; such negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions on the part of the Plaintiff and Plaintiff's decedent and being more particularly set forth as follows:

- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
- b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital;
- c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
- d. in failing to contact a physician or return to the hospital when patient became worse;
- e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

all of which were the direct and proximate cause of any injury or damage sustained by the Plaintiff and Plaintiff's decedent, and this Defendant pleads such negligence, carelessness, recklessness, wantonness, willfulness and gross negligence on the part of the Plaintiff and Plaintiff's decedent and would ask that the Court compare the negligence of the Plaintiff and Plaintiff's decedent and this Defendant, which is specifically denied, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence was greater than the negligence, carelessness, recklessness, wantonness, willfulness and gross negligence of this Defendant, which is specifically denied, then the Plaintiff and Plaintiff's decedent should be totally barred from recovery, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence is equal to or less than the negligence of this Defendant, which is specifically denied, then the amount of recovery available to the Plaintiff and Plaintiff's decedent should be reduced by the percentage of the

Plaintiff's and Plaintiff's decedent's own negligence, carelessness, recklessness, wantonness, willfulness and gross negligence.

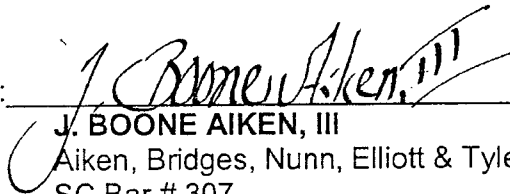
FOR A FIFTH DEFENSE

30. The Defendant, Stephen W. Law, D.O., alleges that an award of punitive damages in this case would violate the 5th, 6th and 14th amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution in that:

- a) The unfettered power to award punitive damages in any manner is wholly devoid of a meaningful standard and is inconsistent with due process guarantees; and,
- b) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness.

WHEREFORE, the Defendant, having fully answered the Plaintiff's Complaint, prays that said Complaint be dismissed with the costs and disbursements of this action.

By: _____


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**ATTORNEYS FOR THE DEFENDANT
STEPHEN W. LAW, D.O.**

Florence, South Carolina

April 2, 2004.

(22108)

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Sean D. Fay, as Personal Representative
for the Estate of Kelly L. Fay, Deceased,

Plaintiff,

-vs-

Grand Strand Regional Medical Center,
LLC d/b/a South Strand Ambulatory
Care Center, Jane Doe, an unidentified
nurse employed with Grand Strand
Regional Medical Center, LLC, Stephen
W. Law, D.O., Carolinahealth
Specialists, Dr. Richard Young, M.D.,
and Grand Strand Urology, LLP,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A 04-CP-26-481 (WRONGFUL DEATH)

ANSWER ON BEHALF OF
RICHARD YOUNG, M.D. AND
GRAND STRAND UROLOGY, LLP

The Defendants Richard Young, M.D. and Grand Strand Urology, LLP, answering the
Complaint of the Plaintiff, will respectfully show unto the Court as follows:

FOR A FIRST DEFENSE

- RD 6xR
1. These Defendants deny each and every allegation of Plaintiff's Complaint not hereinafter specifically admitted, modified or explained. Strict proof is demanded.
 2. Answering the allegations of paragraph one (1) of the Complaint, these Defendants admit so much of paragraph one (1) as alleges, or may be construed to allege, that Defendant Young is a citizen and resident of Horry County, South Carolina. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph one (1) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

3. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs two (2) and three (3) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

4. These Defendants admit the allegations of paragraph four (4) of the Complaint as they pertain to Grand Strand Urology, LLP. Grand Strand Urology, P.A. does not exist.

5. These Defendants deny the allegations of paragraph five (5) of the Complaint as they pertain to these Defendants and demand strict proof thereof. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph five (5) of the Complaint as to the remaining Defendants.

6. With regard to the allegations of paragraph six (6) of the Complaint, these Defendants state that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, these Defendants deny same and demand strict proof thereof.

7. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph seven (7) of the Complaint. These Defendants crave reference to the medical records as to the date the decedent presented to the emergency room as the best evidence of her condition at that time.

8. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph eight (8) of the Complaint. These Defendants crave reference to the medical records as the best evidence of decedent's past medical history.

9. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraphs nine (9) and ten (10) of the Complaint. These Defendants

crave reference to the medical records as to what radiographic studies were performed and the radiologist's interpretation of same.

10. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph eleven (11) of the Complaint. These Defendants crave reference to the medical records as to the medication ordered and administered.

11. Answering the allegations of paragraph twelve (12) of the Complaint, these Defendants admit so much of paragraph twelve (12) as alleges, or may be construed to allege, that Defendant Young was the on-call urologist on January 26, 2002 and that he had a phone conversation with Defendant Law about the patient. Any of the remaining allegations of paragraph twelve (12) of the Complaint that are inconsistent with this are denied and strict proof demanded.

12. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph thirteen (13) of the Complaint. These Defendants crave reference to the medical records as to the medication prescribed.

13. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs fourteen (14) and fifteen (15) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

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3 14. Answering the allegations of paragraph sixteen (16) of the Complaint, these Defendants admit so much of paragraph sixteen (16) as alleges, or may be construed to allege, that the decedent was scheduled for an appointment with Defendant Young at 3:00 p.m. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph sixteen (16) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

15. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs seventeen (17) and eighteen (18) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

16. Answering the allegations of paragraph nineteen (19) of the Complaint, these Defendants crave reference to the medical records as to the decedent's signs and symptoms, Dr. Chi's diagnosis and treatment, and decedent's medical condition.

17. Answering the allegations of paragraph twenty (20) of the Complaint, these Defendants crave reference to the medical records as to the events that transpired on January 28, 2002.

18. These Defendants deny the allegations of paragraphs twenty-one (21), twenty-two (22), twenty-three (23), first paragraph twenty-four (24) (including all sub-parts), second paragraph twenty-four (24), and twenty-five (25) of the Complaint and demand strict proof thereof.

FOR A SECOND DEFENSE

19. That the conduct of these Defendants conforms to and was in full compliance with all applicable standards of care and, at no time pertinent thereto, did these Defendants deviate from any generally accepted medical standard, and as a result, the Plaintiff is barred from recovery against these Defendants.

FOR A THIRD DEFENSE

20. These Defendants allege, upon information and belief, that any injuries and/or damages sustained by Plaintiff's decedent were due to, caused, and occasioned by a natural disease process over which these Defendants had no control and, as such, plead such natural disease

process as a complete bar to this action.

FOR A FOURTH DEFENSE

21. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were caused and occasioned by events over which these Defendants had no control or right of control, thereby relieving these Defendants from any liability or responsibility herein.

FOR A FIFTH DEFENSE

22. That if any injury or damage was sustained as alleged in the Complaint, the Plaintiff's decedent was fully informed of the risks arising out of and connected with:

- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
- b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital.
- c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
- d. in failing to contact a physician or return to the hospital when patient became worse;
- e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

which risks were voluntarily assumed by the Plaintiff's decedent and for which these Defendants are not liable, and these Defendants plead assumption of risk as a bar to this action.

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FOR A SIXTH DEFENSE

23. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were due to the Plaintiff's and Plaintiff's decedent's negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions which combined and concurred with any negligence on the part of these Defendants, which is specifically denied, to produce such injury and damage, if any, and without which such injury and damage would not have occurred; such negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions on the part of the Plaintiff and Plaintiff's decedent and being more particularly set forth as follows:

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- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
 - b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital.
 - c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
 - d. in failing to contact a physician or return to the hospital when patient became worse;
 - e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

all of which were the direct and proximate cause of any injury or damage sustained by the Plaintiff and Plaintiff's decedent, and these Defendants plead such negligence, carelessness, recklessness, wantonness, willfulness and gross negligence on the part of the Plaintiff and Plaintiff's decedent and would ask that the Court compare the negligence of the Plaintiff and Plaintiff's decedent and these Defendants, which is specifically denied, and if it is determined that the Plaintiff's and

Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence was greater than the negligence, carelessness, recklessness, wantonness, willfulness and gross negligence of these Defendants, which is specifically denied, then the Plaintiff and Plaintiff's decedent should be totally barred from recovery, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence is equal to or less than the negligence of these Defendants, which is specifically denied, then the amount of recovery available to the Plaintiff and Plaintiff's decedent should be reduced by the percentage of the Plaintiff's and Plaintiff's decedent's own negligence, carelessness, recklessness, wantonness, willfulness and gross negligence.

FOR A SEVENTH DEFENSE

24. That the Complaint alleges acts of negligence and recklessness on the part of third parties other than these Defendants, and to the extent such third parties' negligence may be proved, these Defendants plead independent negligence of third parties as a complete defense to the allegations herein.

FOR AN EIGHTH DEFENSE

25. That any claim for punitive or exemplary damages as set forth in the Complaint against these Defendants would violate these Defendants' constitutional rights under the due process clause in the Fifth and Fourteenth Amendments to the Constitution of the United States of America, Excessive Fines Clause in the Eighth Amendment to the Constitution of the United States of America, the Double Jeopardy Clause in the Fifth Amendment to the Constitution of the United States of America, and similar provisions in the Constitution of the State of South Carolina and/or the common law and public policies of the State of South Carolina, and/or applicable

statutes and court rules, and these Defendants raise these defenses as a complete bar to the imposition of punitive or exemplary damage against them.

WHEREFORE, having fully responded to the Complaint of the Plaintiff, these Defendants request that the same be dismissed with prejudice together with the costs and disbursements in the defense of this matter and from such other and further relief as this Court deems just and proper.

Marian W. Scalise

Marian Williams Scalise
Richardson, Plowden, Carpenter & Robinson, P.A.
2103 Farlow Street, Suite B, P. O. Box 3646
Myrtle Beach, SC 29578
(843) 448-1008
Attorneys for Defendants Richard Young, M.D. and
Grand Strand Urology, LLP

2/18, 2004.

Myrtle Beach, South Carolina

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

C/A 04-CP-26-480 (SURVIVAL)

Sean D. Fay, as Personal Representative)
for the Estate of Kelly L. Fay, Deceased,)

Plaintiff,)

-vs-)

Grand Strand Regional Medical Center,)
LLC d/b/a South Strand Ambulatory)
Care Center, Jane Doe, an unidentified)
nurse employed with Grand Strand)
Regional Medical Center, LLC, Stephen)
W. Law, D.O., Carolinahealth)
Specialists, Dr. Richard Young, M.D.,)
and Grand Strand Urology, LLP,)

ANSWER ON BEHALF OF
RICHARD YOUNG, M.D. AND
GRAND STRAND UROLOGY, LLP

Defendants.)

The Defendants Richard Young, M.D. and Grand Strand Urology, LLP, answering the Complaint of the Plaintiff, will respectfully show unto the Court as follows:

FOR A FIRST DEFENSE

1. These Defendants deny each and every allegation of Plaintiff's Complaint not hereinafter specifically admitted, modified or explained. Strict proof is demanded.

2. Answering the allegations of paragraph one (1) of the Complaint, these Defendants admit so much of paragraph one (1) as alleges, or may be construed to allege, that Defendant Young is a citizen and resident of Horry County, South Carolina. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph one (1) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

3. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs two (2) and three (3) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

4. These Defendants admit the allegations of paragraph four (4) of the Complaint as they pertain to Grand Strand Urology, LLP. Grand Strand Urology, P.A. does not exist.

5. These Defendants deny the allegations of paragraph five (5) of the Complaint as they pertain to these Defendants and demand strict proof thereof. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph five (5) of the Complaint as to the remaining Defendants.

6. With regard to the allegations of paragraph six (6) of the Complaint, these Defendants state that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, these Defendants deny same and demand strict proof thereof.

7. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph seven (7) of the Complaint. These Defendants crave reference to the medical records as to the date the decedent presented to the emergency room as the best evidence of her condition at that time.

8. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph eight (8) of the Complaint. These Defendants crave reference to the medical records as the best evidence of decedent's past medical history.

9. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraphs nine (9) and ten (10) of the Complaint. These Defendants

crave reference to the medical records as to what radiographic studies were performed and the radiologist's interpretation of same.

10. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph eleven (11) of the Complaint. These Defendants crave reference to the medical records as to the medication ordered and administered.

11. Answering the allegations of paragraph twelve (12) of the Complaint, these Defendants admit so much of paragraph twelve (12) as alleges, or may be construed to allege, that Defendant Young was the on-call urologist on January 26, 2002 and that he had a phone conversation with Defendant Law about the patient. Any of the remaining allegations of paragraph twelve (12) of the Complaint that are inconsistent with this are denied and strict proof demanded.

12. That these Defendants have insufficient information upon which to admit or deny the allegations contained in paragraph thirteen (13) of the Complaint. These Defendants crave reference to the medical records as to the medication prescribed.

13. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs fourteen (14) and fifteen (15) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

14. Answering the allegations of paragraph sixteen (16) of the Complaint, these Defendants admit so much of paragraph sixteen (16) as alleges, or may be construed to allege, that the decedent was scheduled for an appointment with Defendant Young at 3:00 p.m. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph sixteen (16) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

15. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs seventeen (17) and eighteen (18) of the Complaint; therefore, these Defendants deny same and demand strict proof thereof.

16. Answering the allegations of paragraph nineteen (19) of the Complaint, these Defendants crave reference to the medical records as to the decedent's signs and symptoms, Dr. Chi's diagnosis and treatment, and decedent's medical condition.

17. Answering the allegations of paragraph twenty (20) of the Complaint, these Defendants crave reference to the medical records as to the events that transpired on January 28, 2002.

18. These Defendants deny the allegations of paragraphs twenty-one (21), twenty-two (22), twenty-three (23), first paragraph twenty-four (24) (including all sub-parts), twenty-five (25), and twenty-six (26) of the Complaint and demand strict proof thereof.

FOR A SECOND DEFENSE

19. That the conduct of these Defendants conforms to and was in full compliance with all applicable standards of care and, at no time pertinent thereto, did these Defendants deviate from any generally accepted medical standard, and as a result, the Plaintiff is barred from recovery against these Defendants.

FOR A THIRD DEFENSE

20. These Defendants allege, upon information and belief, that any injuries and/or damages sustained by Plaintiff's decedent were due to, caused, and occasioned by a natural disease process over which these Defendants had no control and, as such, plead such natural disease process as a complete bar to this action.

FOR A FOURTH DEFENSE

21. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were caused and occasioned by events over which these Defendants had no control or right of control, thereby relieving these Defendants from any liability or responsibility herein.

FOR A FIFTH DEFENSE

22. That if any injury or damage was sustained as alleged in the Complaint, the Plaintiff's decedent was fully informed of the risks arising out of and connected with:

- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
- b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital.
- c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
- d. in failing to contact a physician or return to the hospital when patient became worse;
- e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

which risks were voluntarily assumed by the Plaintiff's decedent and for which these Defendants are not liable, and these Defendants plead assumption of risk as a bar to this action.

FOR A SIXTH DEFENSE

23. Any injury or damage sustained by the Plaintiff and Plaintiff's decedent as a result of the matters alleged in the Complaint were due to the Plaintiff's and Plaintiff's decedent's negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions which combined and concurred with any negligence on the part of these Defendants, which is specifically denied, to produce such injury and damage, if any, and without which such injury and damage would not have occurred; such negligent, careless, reckless, wanton, willful and grossly negligent acts or omissions on the part of the Plaintiff and Plaintiff's decedent and being more particularly set forth as follows:

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- a. in failing to exercise due care, reasonable care, or any care whatever for decedent's safety;
 - b. in failing to seek follow-up medical care in a timely fashion as instructed upon leaving the hospital.
 - c. in failing and omitting to follow discharge instructions, advice and orders given by Dr. Law or the hospital nursing staff;
 - d. in failing to contact a physician or return to the hospital when patient became worse;
 - e. in failing and omitting to take proper precautions for decedent's health and physical well-being which she knew or should have known would affect her health and well-being;

all of which were the direct and proximate cause of any injury or damage sustained by the Plaintiff and Plaintiff's decedent, and these Defendants plead such negligence, carelessness, recklessness, wantonness, willfulness and gross negligence on the part of the Plaintiff and Plaintiff's decedent and would ask that the Court compare the negligence of the Plaintiff and Plaintiff's decedent and these Defendants, which is specifically denied, and if it is determined that the Plaintiff's and

Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence was greater than the negligence, carelessness, recklessness, wantonness, willfulness and gross negligence of these Defendants, which is specifically denied, then the Plaintiff and Plaintiff's decedent should be totally barred from recovery, and if it is determined that the Plaintiff's and Plaintiff's decedent's negligence, carelessness, recklessness, wantonness, willfulness and gross negligence is equal to or less than the negligence of these Defendants, which is specifically denied, then the amount of recovery available to the Plaintiff and Plaintiff's decedent should be reduced by the percentage of the Plaintiff's and Plaintiff's decedent's own negligence, carelessness, recklessness, wantonness, willfulness and gross negligence.

FOR A SEVENTH DEFENSE

24. That the Complaint alleges acts of negligence and recklessness on the part of third parties other than these Defendants, and to the extent such third parties' negligence may be proved, these Defendants plead independent negligence of third parties as a complete defense to the allegations herein.

FOR AN EIGHTH DEFENSE

RPGR
1 25. That any claim for punitive or exemplary damages as set forth in the Complaint against these Defendants would violate these Defendants' constitutional rights under the due process clause in the Fifth and Fourteenth Amendments to the Constitution of the United States of America, Excessive Fines Clause in the Eighth Amendment to the Constitution of the United States of America, the Double Jeopardy Clause in the Fifth Amendment to the Constitution of the United States of America, and similar provisions in the Constitution of the State of South Carolina and/or the common law and public policies of the State of South Carolina, and/or applicable

statutes and court rules, and these Defendants raise these defenses as a complete bar to the imposition of punitive or exemplary damage against them.

WHEREFORE, having fully responded to the Complaint of the Plaintiff, these Defendants request that the same be dismissed with prejudice together with the costs and disbursements in the defense of this matter and from such other and further relief as this Court deems just and proper.

Marian W. Scalise

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(843) 448-1008
Attorneys for Defendants Richard Young, M.D. and
Grand Strand Urology, LLP

2-18, 2004.

Myrtle Beach, South Carolina

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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2)
 3 COUNTY OF HORRY) (08-CP-26-9047)
 4) (08-CP-26-9368)
 5 SEAN D. FAY, as Personal)
 6 Representative of the)
 7 Estate of Kelly L. Fay,)
 8 deceased.) TRANSCRIPT OF RECORD
 9)
 10 GRAND STRAND REGIONAL) May 17, 18, 19, 20, 21, 2010
 11 MEDICAL CENTER, LLC, dba) May 24, 25, 26, 27, 28, 2010
 12 SOUTH STRAND AMBULATORY) Conway, South Carolina
 13 CARE CENTER, et al)
 14)
 15 B E F O R E:
 16 HONORABLE J. MICHAEL BAXLEY, Judge; and a jury.
 17
 18 A P P E A R A N C E S:
 19 RUSKIN C. FOSTER, ESQ.
 20 BRADLEY HEWITT, ESQ.
 21 ATTORNEYS FOR PLAINTIFF
 22 MONTEITH P. TODD, ESQ.
 23 RANDOLPH L. LEE, ESQ.
 24 ATTORNEYS FOR DEFENDANTS, GRAND STRAND
 25 J. BOONE AIKEN, III, ESQ.
 ATTORNEY FOR DEFENDANTS, LAW AND CAROLINA HEALTH
 MARIAN SCALISE, ESQ.
 LYDIA L. MAGEE, ESQ.
 ATTORNEYS FOR DEFENDANT, YOUNG

 DIXIE COX EUBANK
 CIRCUIT COURT REPORTER
 FIFTEENTH JUDICIAL CIRCUIT

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I N D E X

May 17, 2010

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VOIR DIRE (NOT TRANSCRIBED)

JURY SELECTION (NOT TRANSCRIBED)

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I N D E X

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RC

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MS. MAGEE

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MR. AIKEN

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MR. FOSTER

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MS. MAGEE

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5	MS. MAGEE		427		
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23	MR. AIKEN		626		
24	MR. LEE		645		
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2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>RD</u>	<u>RC</u>
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4	CHRISTINA LAMBERT KNIGHT, R.N.				
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6	MR. TODD		707		733
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12	MR. FOSTER	738/748		818	
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15	MR. AIKEN		1155		
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19	MR. FOSTER	1172			
20	MS. SCALISE		1180		
21	MR. AIKEN		1185		
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6	MR. AIKEN		1513		
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14	MS. SCALISE	1520			
15	MR. FOSTER		1541		
16	MR. TODD		1597		
17	MR. AIKEN		1601		
18	ERIC S. WEINSTEIN, M.D.				
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20	MR. FOSTER		1637		
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1	<u>I N D E X</u>				
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>RD</u>	<u>RC</u>
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7	JURY OUT @ 2:30 P.M.	1945
8	JURY IN/COURT TO JURY	1947
9	JURY OUT @ 3:05 P.M.	1951
10	EXCEPTIONS, ADDITIONS, DELETIONS	1952
11	JURY TO DELIBERATE @ 3:15 P.M.	1952
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15	May 28, 2010	
16	JURY DELIBERATING	1958
17	JURY OUT/ON RECORD @ 11:40 A.M.	1958
18	JURY IN @ 11:45 A.M.	1959
19	VERDICT	1960
20	JURY POLLED	1961
21	JURY OUT/MOTIONS (TO BE HEARD LATER)	1963
22	END DAY	1964
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1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	<u>JOINT EXHIBITS</u>			
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5	# 2	G.S. Regional E.R. record & admission	110	
6	# 3	Bills from G.S. Regional Medical Center	110	
7		(1/26/02) (1/28/02)		
8	# 4	Wal-Mart Pharmacy records	110	
9	# 5	Dr. Kommu's records (3/31/99)	110	
10	# 6	Cape Fear Behavioral Health records (ID ONLY)		
11		(NOT TO GO TO THE JURY) (Also marked Court's # 1)		
12	# 7	Cape Fear Urological records	110	
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1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
3	D-1	KUB (1/26/02)		110
4	D-2	CT scan (1/26/02) (Images 1-20)		110
5	D-3	CT scan (1/26/02) (Images 21-40)		110
6	D-4	CT scan (1/26/02) (Images 41-60)		110
7	D-5	CT scan (1/2/602) (Images 61-80)		110
8	D-6	CT scan (1/26/082) (Images 81-100)		110
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19	C-3	Defendant's Exception to Charge (2pg)		1955
20	C-4	Note from jury (marked off record)		1958
21	C-5	Note from jury (marked off record)		1958
22				
23				
24				
25				
				13

1 (ON MONDAY, MAY 17, 2010, THE JURY VENIRE WAS QUALIFIED.
2 AFTER QUALIFICATION OF THE ENTIRE JURY VENIRE VOIR DIRE WAS
3 CONDUCTED FOR THIS CASE. AFTER VOIR DIRE A JURY WAS SELECTED
4 FOR THE TRIAL OF THIS CASE. AFTER THE JURY WAS SELECTED THERE
5 WERE NO OBJECTIONS TO THE JURY AS SEATED. A JURY SELECTION
6 FORM WAS PREPARED AND IS ATTACHED HERETO. AFTER JURY
7 SELECTION THE JURY FOR THE TRIAL OF THIS CASE WAS ADMONISHED
8 NOT TO DISCUSS THE CASE OR INVESTIGATE IN ANY WAY. THE JURY
9 WAS THEN DISMISSED AND ASKED TO RETURN ON THE FOLLOWING
10 MORNING.)

11 (THE FOLLOWING TAKES PLACE ON MAY 17, 2010, AFTER THE
12 JURY WAS DISMISSED FOR THE DAY, AND OUTSIDE THE PRESENCE OF
13 THE JURY.)

14 THE COURT: All right. I know we have several -- I
15 know we have motions in limine as well as some dispositive
16 motions. Shall we take the dispositive motions first,
17 Counsel?

18 MR. FOSTER: I would think so, Your Honor. It's not my
19 motion but ---

20 THE COURT: Very good. Dr. Young has moved for summary
21 judgment. I have received in advance a Memorandum with case
22 law attached to that. Thank you, Counsel. I'll be glad to
23 hear from you.

24 MS. MAGEE: Thank you, Your Honor.

25 MR. FOSTER: Your Honor, before we start, do you have -

1 - you do have ours, do you not?

2 THE COURT: No, I don't. I did not receive it. We
3 didn't get the Plaintiff's Response.

4 MR. FOSTER: With the Memorandum in Response.

5 THE COURT: To me or to the Clerk's Office?

6 MR. FOSTER: To you.

7 THE COURT: Okay.

8 MS. MAGEE: We got a copy of it.

9 THE COURT: All right. Let's take a moment and let me
10 see if it's in the Clerk's file, because it -- it wasn't in my
11 office.

12 MR. FOSTER: I apologize if somehow it didn't get
13 there, but we did mail it.

14 THE COURT: Okay. Thank you.

15 All right. Ms. Magee, be glad to hear from you.

16 MS. MAGEE: May it please the Court, Lydia Magee on
17 behalf of Dr. Richard Young and Grand Strand Urology.

18 Your Honor, this is a very straight-forward issue for
19 our client. I know that we submitted a very lengthy
20 Memorandum to you with attached case law from South Carolina
21 and other jurisdictions, but really the issue is quite
22 succinct for Dr. Young, and that is that the Plaintiff has
23 failed, as a matter of law, to establish a critical element of
24 his case against Dr. Young, and that is that a
25 physician/patient relationship existed between Dr. Young and

1 Kelly Fay.

2 THE COURT: And let me ask you, if I may, is this the
3 first time this motion has been made in this case?

4 MS. MAGEE: It is, Your Honor.

5 THE COURT: Okay. And why so late?

6 MS. MAGEE: We previously filed a motion back in 2004,
7 I believe.

8 THE COURT: Okay.

9 MS. MAGEE: We withdrew the motion when Plaintiffs had
10 an expert, Dr. Braren, who gave some testimony. There was
11 some discussion about whether or not we needed to go forward
12 if the Plaintiff was going to have some additional experts.
13 He said he was going to have some additional experts so we
14 withdrew it.

15 Dr. Brearan was then subsequently withdrawn as a
16 witness, and we've just now gotten to the point, really, where
17 all the experts have been deposed, and so the only remaining
18 expert, since you've asked that question, has testified for
19 Plaintiff that there was a physician/patient relationship is
20 Dr. Siroky. But we believe that because there is no
21 physician/patient relationship that Dr. Young is entitled to
22 summary judgment as a matter of law.

23 Now at this point I know you are familiar with the facts
24 of this case, and with the allegations of the case, and we
25 would certainly incorporate any arguments that we made in our

1 Memorandum to you into this argument today. But just to kind
2 of touch on the high points of the facts. On January 26,
3 2002, Dr. Young was the on-call physician in Urology for Grand
4 Strand Regional Medical Center. As part of being the on-call
5 physician he took call from the Emergency Room. On that same
6 day Kelly Fay came to the Emergency Room. She was seen by Dr.
7 Law, who was the Emergency Room physician. Dr. Law did an
8 evaluation on Kelly Fay, he did diagnostic tests, he performed
9 a urinalysis, CT Scan, an X-ray. He gave her pain medication,
10 and he diagnosed her with a kidney stone. All of this
11 happened before Dr. Law made any kind of phone call to Dr.
12 Young. In fact, when Dr. Law called Dr. Young he had already
13 made the decision to discharge Kelly Fay. When Dr. Law called
14 Dr. Young he testified in his deposition he never asked for
15 Dr. Young's advice, he never asked Dr. Young if she needed to
16 be admitted. He never asked any information or any
17 information to get an opinion from Dr. Young.

18 Dr. Young testified in his deposition consistent with
19 that. Dr. Young testified that, when he received the phone
20 call from Dr. Law, Dr. Law did not ask him any opinions,
21 didn't ask him any advice, didn't ask him if Kelly Fay needed
22 to be admitted. Dr. Law had already made the decision to
23 discharge Kelly Fay. The purpose that that phone call was to
24 arrange follow-up care for Kelly Fay. It was the weekend.
25 Dr. Young doesn't have a secretary on the weekend. In that

1 capacity he was really acting as his own secretary. If Dr.
2 Law had made the call during a week day he would have gotten
3 Dr. Young's secretary, she would have gotten the information
4 to arrange for a follow-up.

5 That's pretty much the facts of the case. The three
6 cases on point in South Carolina that deal with this issue are
7 Robert v. Hunter, which is 310 S.C. 364, Ellis by Ellis v.
8 Niles, which is 324 S.C. 223, and Tumblin versus Ball-Incon
9 Glass, which is 324 S.C. 359. And those cases all state that,
10 when a physician has not treated, cared for, or otherwise
11 benefit the patient, that no patient/physician relationship
12 exists.

13 Now Mr. Foster is a very good attorney. I respect him.
14 I know he's a zealous advocate for his client. I know the
15 first thing that he's going to say, or one of his associates
16 is going to say when he comes up here is that this is a
17 question of fact for the jury. And in some cases he may be
18 right, but this is not the case. The reality of this case,
19 based on the conversation that Dr. Law and Dr. Young had, and
20 the case law from South Carolina and the other -- all the
21 other jurisdictions that I looked at, is that there can be no
22 question of fact about the existence of a physician/patient
23 relationship because it was never established with Dr. Young.
24 The only contact that Dr. Young had with Dr. Law is that phone
25 call. He had no contact with Kelly Fay.

1 This entire case against Dr. Young turns on whether that
2 phone call between Dr. Law and Dr. Young was sufficient, in
3 and of itself, to create a physician/patient relationship.
4 The substance of that phone call is not in dispute. Both Dr.
5 Law and Dr. Young have testified that Dr. Law already made the
6 treatment decision, he already made the diagnosis, he already
7 rendered care, and he already decided to discharge the patient
8 when he called Dr. Young. They both testified that Dr. Young
9 was only called for follow-up care.

10 Mr. Foster, having read his Memorandum, would have this
11 Court interpret that conversation as some sort of
12 collaboration between Dr. Law and Dr. Young to treat and
13 diagnose the patient. The characterization of the testimony
14 is inaccurate, and that is not the law in South Carolina or
15 any of the other jurisdictions I was able to find. What the
16 law actually requires is some affirmative act on the part of
17 the on-call physician to diagnose or treat the patient.

18 And I invite you to look at the cases that Mr. Foster
19 has cited in his Memorandum, because we believe that's what
20 all of those cases say, and actually support our position as
21 well. A physician/patient relationship can only be created
22 when medical treatment or advice is rendered. Dr. Law and Dr.
23 Young's phone call does not rise to the level of -- as a
24 matter of law, that a physician/patient relationship was
25 created, and neither does the fact that a doctor has agreed to

1 see a patient sometime in the future establish a
2 physician/patient relationship.

3 Now what is an affirmative act that would establish a
4 physician/patient relationship? A review of the case law that
5 I and Mr. Foster have cited indicates that an affirmative act
6 is examining the patient, giving advice to the E.R. physician
7 on how to direct the care of the patient, giving a treatment
8 plan, telling the E.R. physician what to do, and how to treat,
9 diagnosing the patient, and admitting the patient.

10 I cited a case, it's El Majzoub -- it's from another
11 jurisdiction. I believe it's from Texas. But in that case,
12 even when the on-call physician told the Emergency Room
13 physician what he would normally do in the case the E.R. --
14 the on-call physician told the E.R. physician that it would
15 probably be okay to give more medicine. The on-call physician
16 told the emergency room physician to keep the patient for
17 observation, and then call him back after a period of
18 observation, and the on-call physician told him, send her to
19 me for follow-up. And in that case the Court found that those
20 -- that conversation, and those directions to the emergency
21 room physician by the on-call doctor were not affirmative acts
22 sufficient to establish a physician/patient relationship. And
23 the conversation that Dr. Young and Dr. Law had nowhere near
24 parallels that factual scenario. This is not a close case.
25 It is clear and evident that there was no physician/patient

1 relationship established between Dr. Law -- between Dr. Young
2 and Kelly Fay, because Dr. Young never undertook to render any
3 treatment or diagnosis of Kelly Fay.

4 Plaintiff would take the position that because Dr. Law -
5 - Dr. Young was the on-call physician he was contractually
6 obligated to come and care. First of all, Dr. Young's
7 obligation was to the hospital to take call. He was not
8 contractually obligated to come and evaluate Kelly Fay, but
9 even in the scenario, if you assign some special weight to the
10 fact that he was an on-call doctor, the key is still that you
11 have to have some affirmative act to perform or otherwise
12 commit some act to treat, care for or diagnose the patient.
13 The physician's on-call staff alone is not sufficient to
14 warrant a finding that a doctor impliedly consented to a
15 physician/patient relationship, neither is an agreement by Dr.
16 Young to see Kelly Fay in the future.

17 The **Jackson** case that I've cited in my Memorandum held
18 that, to establish a physician/patient relationship imposing a
19 duty on an on-call doctor prior to a follow-up appointment on
20 Monday would significantly extend the duty of a physician who
21 had no previous contact with the patient and that they
22 declined to do. The Appellate Courts of this Country have
23 consistently held that simply being an on-call physician
24 answering the phone is not enough to establish a
25 physician/patient relationship. And the Appellate Courts

1 recognize that, if you extend liability in these situations
2 where no care has been given to the patient, no treatment has
3 been directed by the on-call physician, would fundamentally
4 change the way medicine is practiced in this Country, and not
5 for the better. It would benefit neither the patient, the
6 physician nor the quality of care.

7 I don't really want to spend a lot of time going through
8 Mr. Foster's Memorandum, but I must point out that the cases
9 he did provide to you were ten cases from other jurisdictions.
10 None of them are analogous to the facts of this case. Half of
11 them granted summary judgment to the defendant doctor on the
12 basis that there was no physician/patient relationship, and
13 all of them require an affirmative act by the on-call
14 physician to establish a physician/patient relationship.

15 Several of those cases discuss the on-call physician
16 having a conversation with a nurse in the E.R., or with
17 supervising residents in the E.R., or the doctors actually
18 gave orders, or they prescribed medications, or they admitted
19 the patient to the hospital. That is not the situation here.
20 The case law has noted that this is a question that requires
21 legal analysis on a case by case basis. It is not a medical
22 question that Plaintiff's expert can create. In fact, if you
23 were to accept Plaintiff's expert, Dr. Siroky's opinion it
24 would be to impose a physician/patient relationship every time
25 an on-call physician answers the phone, and that is not the

1 standard under the law.

2 Now, I do want to quote to you from the Mead versus
3 Legacy Health System case. That's a case from Oregon which
4 Plaintiff cites in his Memorandum, and to quote, says, quote,
5 "The pivotal inquiry is whether the on-call physician
6 affirmatively participates in the care of the patient. That
7 affirmative participation exists if the on-call physician
8 undertakes to diagnose or treat the patient." In Mead the
9 Court found that the defendant's on-call status, in and of
10 itself, did not give rise to the physician/patient
11 relationship, but combined with that on-call physician's
12 advice that the patient was not a neurosurgical candidate, and
13 that the patient should be admitted for pain management
14 observation constituted a diagnosis and treatment to establish
15 a physician/patient relationship.

16 That is not the situation we have in this case, but yet
17 that is the case that Plaintiff cites to support his position
18 that physician/patient relationship was established. That
19 standard can, and should not translate to the outcome which he
20 advocates here.

21 Finally, regarding Plaintiff's Memorandum, he did state
22 that we had admitted in our Answer that we -- there was a
23 consult with Dr. Law about Kelly Fay, and I'm not sure if he
24 was looking actually another co-defendant's Answer not -- we
25 did not admit that in our Answer. The only thing we stated

1 was that there was a telephone conversation between Dr. Law
2 and Dr. Young, not that there was any kind of consult.

3 So, Your Honor, I do think that the facts in this case
4 are clear. Our client, Dr. Young, did not participate in the
5 care of the patient which is required to find a
6 physician/patient relationship, and because there is no
7 genuine issue of material fact on that, pursuant to the case
8 law from every jurisdiction I reviewed, we do think that Dr.
9 Law (SIC) and Grand Strand Urology are entitled to summary
10 judgment as a matter of law, and without a physician/patient
11 relationship there can be no duty as a matter of law.

12 **THE COURT:** All right, Counsel, what jurisdiction is
13 the **Jackson** case from?

14 **MS. MAGEE:** And Your Honor, the cases I cite in my
15 Memorandum were from other jurisdictions, other than the three
16 South Carolina cases, and I believe **Jackson** was from ---

17 **THE COURT:** And your position is that **Jackson** stands
18 for the premise that merely scheduling an appointment does not
19 establish a patient/physician relationship, am I correct?

20 **MS. MAGEE:** Let me just grab that case. **Jackson** is
21 from Texas.

22 And Your Honor, on page -- the cite of that case is 76
23 S.W. 3rd 177, and it pinpoints cite 183. In that case the
24 physician agreed -- the on-call physician agreed to see the
25 patient and evaluate him, but he never had the opportunity to

1 do so, and the Supreme Court said that the physician's
2 agreement to see a new patient should not, by itself,
3 establish the physician/patient relationship. To hold that
4 there was a physician/patient relation -- and I'm quoting, "To
5 hold that there was a physician/patient relationship imposing
6 a duty on Dr. Isaac prior to the Monday appointment would
7 significantly extend the duty of a physician where the
8 physician had no previous contact with the patient he declined
9 to do.

10 THE COURT: All right. Let's do this. Let me hear
11 from the Plaintiff, and then I must -- will give you the
12 opportunity to reply, but I most likely will have some
13 questions at that point, okay.

14 MS. MAGEE: Thank you, Your Honor.

15 THE COURT: I thank you.

16 MR. FOSTER: May it please the Court.

17 THE COURT: Yes sir.

18 MR. FOSTER: If it doesn't bother you I'm going to have
19 to have some water here because there's going to have to be
20 some reading done to let you know our position.

21 THE COURT: All right. Just remember when you are
22 reading our Court Reporter tries to take down what you say, so

23 ---

24 MR. FOSTER: Thank you, Judge, and I tend to talk too
25 fast, so if I do just point at me and I'll ---

1 **THE COURT:** All right.

2 **MR. FOSTER:** ---I'll try to slow down as best I can.

3 Okay.

4 Judge, first let me address just a couple of things Ms.
5 Magee said, and I would like to bring to your attention that
6 we do rely on some of the same cases, no question. But what I
7 would like to bring to your attention, just to address some of
8 the things she said, and then I would like to get into our
9 Brief in opposition and tell you why. Let me give you a brief
10 history from our perspective. Okay.

11 Kelly goes into the hospital -- Sean and Kelly go into
12 the hospital at 7:30 -- they leave the house around 7:30.
13 They get there -- she starts hurting about 7:30 A.M. Saturday
14 morning, on the 26th, they go to the Emergency Room.

15 And let me premise it by all this, because I think
16 you've probably learned it from the Briefs and the motions
17 that you've gotten already, but when I first started this case
18 I learned something from Dr. Young and Dr. Law and other
19 doctors that I had never heard in my life before, which Dr.
20 Young freely and clearly admits, and so does every textbook in
21 the world almost, that I could find, every medical textbook,
22 that a kidney stone and a fever is a true urologic emergency,
23 and that's coming from the Defendant Urologist. Okay. So if
24 you have a kidney stone, and you have a fever, it's a true
25 urologic emergency. They would -- Dr. Young said that he

1 would come into the hospital immediately, you don't pass go,
2 she would go to the O.R., she would be drained to get that
3 urine out so it doesn't infected, and what happened, happened,
4 okay, so with that premise in mind.

5 Now, I had the same question Your Honor had. I think
6 the depositions that they are relying on for their factual --
7 for the factual testimony, are the depositions of Dr. Young
8 and Dr. Law, and if I recall correctly -- and I may be wrong
9 on this -- but I think they were taken in -- both in 2004, and
10 they were -- I'm right about that. I'll hand up the original
11 depositions at this point, Your Honor, for Dr. Law and Dr.
12 Young. Those were both done in 2004, and if that's the only
13 basis that they have, other than the case law that they've
14 cited for a motion for summary judgment then really -- I mean,
15 I'm kind of thinking they should have been out six years ago,
16 this should have been over with, but it's not, and it's here,
17 so we have to address it.

18 Your Honor, at a very minimum this is a question of
19 fact, at a very minimum, and I submit to you that we can prove
20 to the jury that they did have it -- they did have a
21 physician/patient relationship.

22 Let me continue with the visit, okay. She goes in.
23 Kelly already knew, because she had had a kidney stone before.
24 She was already pretty sure she had a kidney stone when she
25 got to the Emergency Room. So she goes to the Emergency Room

1 and Dr. Law was the Emergency Room physician at the time. The
2 only -- keeping in mind that kidney stone and infection equal
3 emergency, true urologic emergency, and Dr. Law admitted that
4 as well as Dr. Young.

5 All they do to rule out a -- all he does, he brings her
6 in and they do a KUB, which is a flat x-ray, okay. They see a
7 stone on there. The only laboratory test that they did to
8 rule out infection was not a urinalysis, but part of a
9 urinalysis. It was a dip-stick. That was the only thing that
10 was done to rule out infection in Kelly Fay. Urinalysis is a
11 dip-stick in a microscopic analysis of the urine to see if
12 there's bacteria in it. You can't see bacteria on a dip-
13 stick.

14 So the any rate, when they got the urinalysis back there
15 was the absence of blood in the urine, and Dr. Young -- Dr.
16 Law says, because there was the absence of blood in the urine
17 he wanted to do a CT, so they performed a CT on her. The
18 diagno -- again, of course it showed -- it showed kidney
19 stone, and possibly some other things that the experts will
20 get into, okay, on that CT.

21 He then calls Dr. Young, who is the on-call Urologist at
22 Grand Strand Regional Medical Hospital. Dr. Young has a
23 duty -- not only -- well, let me go into the phone call, first
24 of all. Ms. Magee talks about what they said on the phone
25 call, what Dr. Young says he said on the phone call, and what

1 Dr. Law says they said on the phone call, but in their
2 deposition -- and I'll get to this in a little while -- the
3 gist of what they said was, they specifically don't remember
4 what they said to each other on the phone call. There's a lot
5 of what we would generally talk about, and what we would
6 generally do is this and that, but they have no specific
7 recollection of that phone call. Dr. Young told me he
8 couldn't tell me when it was. He couldn't tell me -- they
9 could -- the only thing that I think that Dr. Law remembers
10 from the phone call was that he had to -- he had to call Dr.
11 Young several times before he ever answered.

12 **THE COURT:** Right. But Counsel, wouldn't you expect
13 some two years later when the suit arrives, when it's just
14 another day in the hospital, or another day on call, and the
15 question about setting up an appointment or whatever it may
16 have been, I wouldn't expect the physicians to have an
17 independent recollection.

18 **MR. FOSTER:** And Your Honor, I would agree with that
19 proposition, okay, but for a couple of circumstances, which
20 will come out obviously during the trial, but I'll tell you a
21 little bit about it right now. You know the short time
22 period. She came in on Saturday and was discharged, and she
23 died on Monday. Okay.

24 Well, Dr. Law just happened to be in the hospital at
25 Grand Strand, not South Strand, but Grand Strand, when she

1 came into the Emergency Room, so Dr. Chi and Dr. Hocker were
2 her treating physicians there, and they did the best they
3 could, I mean, she just was in septic shock and it was -- it
4 was pretty much over by the time she got to Grand Strand.
5 They couldn't save her life.

6 But Dr. Law happened to be there, and after -- so he was
7 there, saw her, saw what condition she was in, and they knew
8 she died that night. Well, the next day or the next day --
9 they are not sure which -- Dr. Molnar, who is the head of the
10 E.R. group, and Dr. Law, and Dr. Young, and there's some
11 discrepancy whether they were all three together at the same
12 time or whether it was two together and one, but they all went
13 over and reviewed the -- and looked at all the records to see
14 if they had done anything wrong. Now, I mean, I know you know
15 the conclusion of that or we wouldn't be here. But at any
16 rate, so I kind of would expect them to remember something
17 about it, but I agree, you know, two years later is a lot of
18 patients, but not in one where you went through all this, and
19 you saw this, and you went and reviewed the records, and had a
20 big discussion about the case, and whether you did anything
21 wrong with the other doctors or not, so on memory for that.

22 Now, when she says that the physician/patient
23 relationship isn't determined by expert testimony I think -- I
24 think there is also an element of truth in that. I think
25 there can be evidence by expert testimony, but I think this is

1 a matter for you to decide as a matter of law, first of all,
2 but really the physician/patient relationship in South
3 Carolina is a question of fact. And there is a paucity of
4 case law in South Carolina on the physician/patient
5 relationship.

6 Now let me get back to what happened. When he calls --
7 what we have brought out through deposition, Your Honor, what
8 we have brought out -- and I will read you the excerpts, so
9 that you will see that there is a question of fact here. At a
10 very minimum it's a question of fact, if it's not a novel
11 issue because of the paucity of case law on the particular
12 subject. As you probably noted, Ms. Magee said several times,
13 not only in her Brief but in her argument, that a phone call
14 in and of itself does not create a physician/patient
15 relationship, and I think that's a true statement of law. I
16 think there's no question about that, in and of itself just a
17 phone call, but the Court's have considered many different
18 factors other than -- this was not just a phone call. He
19 called him -- and I will read you excerpts from the deposition
20 in a little while, and they say they can't remember
21 specifically what they talked about. Dr. Law says he does
22 remember he had to call him several times, and Dr. Young, in
23 his deposition, said -- I think he said he remembered -- oh,
24 that he knew the results of the CT scan, and that he generally
25 would have gone over all the case with him, and all the

1 findings.

2 But now, here's what makes it not a phone call, not just
3 a phone call. Number one, Dr. Young was the on-call urologist
4 for Grand Strand that weekend, so if any Emergency Room
5 physician at South Strand, at Grand Strand, or anybody else,
6 had called Dr. Young and said, look, I think you need to come
7 see this patient he had a contractual obligation and a duty to
8 go see that patient. This is not -- this is not an informal
9 consult -- and that's by the by-laws of the hospital.

10 I'll read you the by-laws of the hospital, first of all.
11 Now, granted in their depositions they don't admit that -- Dr.
12 Law does not admit that he asked Dr. Young to come in
13 specifically, but then again, they don't remember -- they
14 don't recall the specifics of the conversation.

15 **THE COURT:** Well, let me ask you this, Counsel, what
16 inferential evidence then, or circumstantial evidence, do you
17 have that he made such a request?

18 **MR. FOSTER:** Okay. Before I get into the contractual
19 obligation, Your Honor.

20 **THE COURT:** Well, I think the by-laws of the hospital
21 are pretty standard in all the hospitals.

22 **MR. FOSTER:** Yes sir. They have to take calls in order
23 to have privileges.

24 **THE COURT:** Right. But what evidence do you have that
25 he was asked to come in?

1 **MR. FOSTER:** Okay. Well, it's not necessary that he
2 come in, Your Honor. The law -- the case -- but I'm going to
3 give you some, I'm going to give you some in just a second.
4 Okay.

5 **THE COURT:** All right.

6 **MR. FOSTER:** The case law in South Carolina that we
7 have is pretty clear. What establishes the physician/patient
8 relationship is whether the patient knowingly -- whether the
9 doctor knowingly accepts the patient, and the patient
10 knowingly accept the doctor.

11 **THE COURT:** Right.

12 **MR. FOSTER:** Okay. And that establishes -- in South
13 Carolina, at this point, that establishes a patient -- a
14 physician/patient relationship.

15 **THE COURT:** Right.

16 **MR. FOSTER:** All right, now, in Dr. Law's dictated --
17 dictated E.R. report, on the last page, in the last
18 paragraph -- and I'll stand back from the microphone and I'll
19 read this to you.

20 **THE COURT:** Thank you.

21 **MR. FOSTER:** It says, "Consult...", colon, where it
22 says, "CONS" colon -- let me hand you this before I -- it
23 says, consult, colon, "The case was discussed with Dr. Richard
24 Young, on-call urologist, who requests to see the patient on
25 Monday since the patient's pain is under control."

1 Now, you know, Judge, I don't have to read the standard
2 review of summary judgment. I know you've heard it a million
3 times, but all inferences -- and even if the facts are in
4 dispute any inference, any inferenc -- even the inferences --
5 all inferences are to be construed in my favor, and I
6 certainly think there's an inference, when it doesn't come
7 right out and say it, that -- when he says the case -- and
8 they agreed with me, one of them agreed with me in their
9 deposition. The case was discussed with Dr. Richard Young,
10 on-call, who requests to see the patient on Monday versus
11 today. In other words, look, you know, I want to see her
12 Monday instead of today, because he's calling him on
13 Saturday -- on Monday, since the patient's pain is under
14 control, okay, and that's the pertinent portion out of that,
15 but this -- for this portion of the argument.

16 Now, Your Honor, the big thing in this is -- and this
17 will come out when I read you the excerpts from the deposition
18 -- is that Dr. Young did participate in the decision to
19 discharge her, and that's what this case is over. It's not
20 about the treatment that Dr. Law gave her, it's what he didn't
21 do, and Dr. Young participated and concurred in the opinion
22 that she was okay to discharge, and that is active and
23 affirmative action when they combine and concur on the
24 decision as to whether the patient can be discharged or not.

25 And Your Honor, when you learn all the facts of the

1 case, as soon as they left -- kidney stone, fever, emergency.
2 As soon as he got her home and took her temperature her
3 temperature was one-oh-one point three. Okay. At the
4 hospital they never took her temperature one time, not one
5 single time after she walked in the door at eight o'clock.
6 She was there four hours. She was there until noon, and she
7 was allowed -- she was allowed to be sent home without anybody
8 ever rechecking her fever to see if she had spiked a temp.

9 Now both of them have admitted that the infection that
10 she died from, or at least a urinary tract infection, okay, if
11 not pyelonephritis, can arise in a matter of hours, or it can
12 arise in a matter of days. So if it can arise -- and think
13 they are -- to quote them in their deposition, to quote Dr.
14 Law -- Young in his deposition, he said a couple of hours,
15 which would be two. She was there four, her temperature was
16 temperature was never even checked before she left, so they --
17 so, any time they say that they know what her temperature was,
18 the only time they ever know what her temperature was -- and
19 it was normal at eight o'clock in the morning, okay, but after
20 that nobody checks, so nobody knows what her temperature was.

21 Now, -- and Your Honor, just in case you haven't
22 understand -- understood this so far, is the kidney stone --
23 it wasn't just a simple kidney stone, it was an obstructing
24 kidney stone. There was severe hydroureter according to Dr.
25 Law's diagnosis, which means she had urine backed up behind

1 the stone in the proximal ureter, up here near the kidney,
2 which is static urine, which they've all admitted in a perfect
3 culture. It's almost like a petri disk to grow bacteria.
4 When the urine is static, then bacteria -- it's a perfect
5 place to grow bacteria.

6 Now, -- and I don't know if I mentioned this before, but
7 with all the facts of this case, and what I'm going to read to
8 Your Honor, we would submit not only that the inferences
9 should be construed in our favor and their motion denied, but
10 if not it's almost a novel issue, and we know that summary --
11 the law is that summary judgment should not be granted on a
12 novel issue of law.

13 Now, here's what the South Carolina Court's have held,
14 Your Honor -- well, let me talk -- if you would, indulge me
15 and give me a little bit to talk about a few more things Ms.
16 Magee addressed, and I'll tell you what I agree with. A phone
17 call, in and of itself, no, it does not establish the
18 physician/patient relationship, but this is not just a phone
19 call. This is a phone call -- this is a phone call where Dr.
20 Young requested to see her, and there's case law from other
21 jurisdictions that say that the patient doesn't have to
22 personally agree to see the physician, it can be done through
23 another physician, like Dr. Law. He requested to see her, and
24 not only did he request to see her, but on the -- as part of
25 the discharge instructions, Your Honor, Dr. Law had instructed

1 her to call Dr. Young's office -- not any urologist, but
2 specifically Dr. Young, because he had requested to see her
3 Monday instead of Saturday, at 8:30 A.M., which he did, and
4 they made an appointment, but he had scheduled surgery, that
5 he knew weeks in advance that he had, that he wouldn't be in
6 till that afternoon, so her appointment couldn't be made -- so
7 they wouldn't make her an appointment until three o'clock that
8 afternoon, and by that time she was already being transported
9 to Grand Strand in septic shock.

10 Now, also included with the discharge instructions, Your
11 Honor -- and I'll hand these up -- I'll hand you a copy of
12 this.

13 **THE COURT:** Thank you.

14 **MR. FOSTER:** Thank you, Your Honor.

15 Is where -- it's where -- it says, "Your follow-up care
16 has been ..." -- well, the biggest thing I wanted to tell you,
17 Judge, is, I don't know how there could be a bigger -- after I
18 read you the excerpt of the deposition where -- of course they
19 are not going to admit, oh yes, there was a physician/patient
20 relationship. They are not going to do that in their
21 depositions. But when I read you what they did -- they did
22 admit some parts it in their deposition, but there's tons and
23 tons of we made the decision, our decision, he agreed with my
24 decision to discharge, etcetera. The discharge is the key in
25 this case. Everybody in this courtroom will agree -- and this

1 is part of the trial that everybody agrees on, it's just who
2 they blame for it, okay, we blame them, they blame us. They
3 blame Sean for not bringing her back in.

4 But if she had been admitted to the hospital on Saturday
5 she would be alive. If she had been admitted to the hospital
6 on Sunday she would be alive. If she had been there early
7 enough on Monday she might even have had a chance. Okay. So,
8 anyway, so they follow up with Dr. Young, and they give her
9 Dr. Young's phone number, his address. She has to sign a
10 release for her records to be forwarded to Dr. Young, all
11 right, otherwise it's a violation of HIPAA, it's a violation
12 of Federal Law, he had no -- he had no entitlement to her
13 records unless it was a -- unless there was a
14 physician/patient relationship going on here.

15 I've handed you that up. Not only that, Your Honor, on
16 the dictated E.R. report that I just handed you, Dr. Young was
17 copied on that report. He was cc'd on that report which, if
18 you will look, Dr. Law contends he dictated before she left
19 the hospital, and was supposedly transcribed six minutes after
20 twelve, if I recall correctly.

21 Now, -- and you know the by-law -- I won't -- I'll spare
22 you reading the by-laws, if the Court can take judicial notice
23 that you have to respond -- I mean, had Dr. Law asked him to
24 come in -- and of course we don't know the specifics of the
25 conversation -- then he obviously had a duty, and had a

1 physician/patient relationship to come in and do that. I
2 mean, this thing about not personally seeing her, and hadn't
3 seen her yet, not laid hands on her and all that, that's not -
4 - that's not the law in South Carolina. It's whether she
5 accepted to see him and he agreed to see her. He's the one
6 that first asked to see her, and then she agreed -- she agreed
7 to see him. That's when the physician/patient relationship
8 was established, right there, if we going under South Carolina
9 law.

10 Now, the big case in South Carolina, it was the **Roberts**
11 case -- but it's pretty much the seminal case -- is where
12 the -- I think it was the E.R. physician, called the
13 neurologist in the hospital, and he agreed to come down and
14 see the patient in the E.R.. Well, before he could even get
15 down to see the patient in the E.R. the patient got mad and
16 left AMA. Of course there's no physician/patient relationship
17 there. I mean, I wouldn't argue that to you. I wouldn't even
18 dream of it. There's obviously none there, but that's -- but
19 the Court -- but the Court did lay out the law. It's a
20 contractual sort of agreement as to whether there is
21 physician/patient. But when he agrees to discharge her that
22 was -- regardless of who you blame, whether you blame Sean
23 Fay, or whether you blame these doctors for discharging her,
24 that was the cause of her -- that was one of the causes of her
25 death, that was one of the chances they had to save her life,

1 was -- and on top of that, Your Honor, when Ms. Magee says it
2 was Dr. Young's (SIC) decision as to what to do with it, now
3 that's true. It would be Dr. You -- it would be Dr. Law's
4 decision as to charge, but the only person that could have
5 admitted Kelly was Dr. Young, because the E.R. physicians
6 don't have admitting privileges. He could not admit her to
7 the hospital if he wanted to. He would have had to get Dr.
8 Young to come into the hospital and admit her, so Dr. Young
9 was the only person that could have admitted her. So when
10 he's deciding he's not going to admit her, and discharge,
11 that's participation in and of itself. That's affirmative
12 action. It's affirmative action in and of itself by saying,
13 she's okay, she's stable to discharge.

14 Now, keep in mind again, kidney stone and fever is an
15 emergency, and there's no way in the world -- and both of them
16 testified under oath in their deposition -- they don't know
17 what her temperature was, they don't know whether she had a
18 fever, but yet they both agreed she could go home.

19 **THE COURT:** All right. Counsel, how -- isn't it
20 speculative to say her fever went up? I mean, what evidence
21 do you have -- again, at this point, all the evidence is
22 construed in a light most favorable to the non-moving party,
23 but what -- what is the evidence her fever went up?

24 **MR. FOSTER:** The evidence that her fever went up
25 started when they walked out of the door. Sean Fay's sworn

1 testimony is that she -- on the way to the car, and in the
2 car, she got flushed and was sweating. The inference is
3 within the hour -- and the experts have testified, not only
4 from a temporal standpoint -- within the hour when he got her
5 home her temperature was one-oh-one point three, and the
6 expert testimony will be that, not only from a temporal
7 standpoint, but from some other microbiology, and things that
8 we probably don't really need to get into right now, because
9 it's boring enough as it is, that she had a fever at the
10 hospital.

11 THE COURT: Okay.

12 MR. FOSTER: There will be expert testimony that she
13 had a fever, more likely than not, when she left the hospital,
14 and that they should have checked her temperature.

15 Now, there is even -- Your Honor, there is even -- I
16 mean, when you go that far, there's even a vital sign policy.
17 Her chief complaint, if you will notice on that report, was
18 abdom -- there's -- see, there's even a disagreement as to
19 where her pain -- they want to call it flank pain, but if you
20 will look at what Dr. Law wrote, he wrote, "Chief complaint,
21 abdominal pain and flank pain", and we'll get into that later.

22 THE COURT: Okay.

23 MR. FOSTER: The flank is part of the abdomen, but he
24 wrote abdominal pain. There's a vital sign policy at that
25 hospital, enforced at that time, that says any abdominal pain

1 patient gets at least two sets of vitals, and all -- everybody
2 agrees that temperature is a vital, okay, especially in this
3 instance, Your Honor, when the only thing that makes a kidney
4 stone an emergency is a fever, then -- I'll leave that where
5 it is for now.

6 THE COURT: All right.

7 MR. FOSTER: Now -- but she went on and on about the
8 phone call, and I just don't see how Dr. Young can walk out of
9 here and disclaim any liability based on the fact that there
10 was a phone call they don't recall the specifics of. That
11 just doesn't seem right.

12 Now, other jurisdictions -- we've cited some of the same
13 cases. We cited some cases in our Memorandum, Your Honor, and
14 you will see that, where they did, in fact, say there was no
15 physician/patient relationship, but they did give guidelines,
16 okay, as to what would be a physician/patient relationship.

17 And let me just read the language of **Hunter**, because
18 that's the South Carolina case that really -- really the one
19 we've got to put our hat on, that every -- I mean, if we are
20 going to go by South Carolina law instead of other
21 jurisdictions, and we've cited plenty of other jurisdictions
22 too. But its says, "The relation is a consensual one wherein
23 the patient) knowingly seeks the assistance of physician, and
24 the physician knowingly accepts him as a patient", and that's
25 what I've just showed you. He asked to see her, she agreed to

1 see him, and signed papers allowing him to get her private
2 medical records, otherwise you've got a HIPAA violation. Dr.
3 Law copied her on the E.R. report, otherwise it's a HIPAA
4 violation, she wasn't his doctor, he had no business having
5 them.

6 Now, a lot of people want to argue that there has to be
7 some kind of physical contact or affirmative act. I think
8 there was affirmative act, there wasn't a physical contact
9 because he didn't come in to see her, but that, Your Honor, is
10 not necessary to establish the relationship, otherwise a
11 radiologist is immune, a physician that's working in the
12 laboratory that mixes up specimens, or something like that,
13 he's immune, I mean, he's never going to see or lay hands on a
14 patient, but there's an implied physician/patient
15 relationship, a leap by -- a contractually legal one from the
16 fact that the physician that's seeing them sends it to the
17 lab, or the radiologist, for a diagnosis.

18 Now, let's talk about his affirmative act, or
19 participating in the diagnosis and the course of treatment.
20 When I say course of treatment, Your Honor, again, I think
21 I've emphasized enough to you, the big thing is the fact
22 they -- is that they her home instead of checking her
23 temperature and putting her in the hospital.

24 The jurisdictions that we found, Your Honor, that have
25 considered this, the consulting physicians contact law on

1 call, communication is not in the category of an informal
2 consult, especially if the physician's on-call obligation is
3 contractual or conditioned for hospital privileges, and that's
4 the **Miller** case out of Indiana decided in 2001. This is not
5 what they call a courtesy consult, Your Honor, that is where,
6 for example, Dr. Law knows a urologist -- this is a buddy of
7 his -- and he goes, hey -- he calls him up and he says him, he
8 goes, look, I've got a patient in the E.R. with a kidney stone
9 and it's obstructing and there's extravasation of urine
10 outside the collecting system, and all these other details,
11 and I'm not sure what to do, and the physician goes, well, you
12 know, I -- this is what I would do if I were you. That's a
13 courtesy consult because that physician has no duty to answer
14 his question. That's a courtesy, and that should be a
15 courtesy. That's what controls medical practice in this
16 Country. What we are saying here is not going to change the
17 practice in this Country, it's going to keep the practice in
18 this Country to where it should be. The on-call urologist,
19 the one that's on duty, when he participates and agrees, and
20 participates in the decision that she can be discharged, that
21 is treatment. It's an omission, but it's still -- it's still
22 treating, in fact it killed her, Your Honor.

23 Now -- and let me continue.

24 **THE COURT:** Well actually, Counsel, let's do this. I'm
25 fully -- I understand your position.

1 Let me hear, in reply, what -- what there may be in
2 reply, and I'll come back to you if I have further questions.

3 **MR. FOSTER:** Okay. And the only thing I would ask that
4 you let me do after that reply, if you see necessary, Your
5 Honor, is to let me read you the deposition excerpts where
6 they said, we, and us, and I, our decision, and that sort of
7 thing.

8 **THE COURT:** Very good.

9 **MR. FOSTER:** Thank you, Your Honor.

10 **THE COURT:** Thank you, Counsel.

11 **MS. MAGEE:** Thank you, Your Honor. Just to kind of --
12 the first thing that comes to mind off the top of my head, he
13 said, you know -- he gave an example that a radiologist would
14 never have a physician/patient relationship because he's not
15 actually seeing the patient. We didn't argue that. A
16 radiologist does have a physician/patient relationship because
17 they are making diagnoses whenever they are interpreting
18 films, and they are making recommendations for treatment.

19 The Roberts v. Hunter case -- and he quoted from the
20 Roberts v. Hunter, the quote is, "The relation is a consensual
21 one wherein the patient knowingly seeks assistance of the
22 physician and the physician knowingly accepts him as a
23 patient", period. Because this was -- the **Roberts** case, I
24 guess it was an issue of first impression. It's not now
25 because the **Roberts** case is already decided, decided from the

1 Am Jur, Physicians and Surgeons sections on that, but the case
2 goes on to state, quote, "Here it is undisputed that Dr. Hayes
3 neither examined Roberts nor reviewed his file, the
4 examination was made impossible by Roberts' departure from the
5 hospital."

6 **THE COURT:** All right. And stop right there. Isn't
7 that really what the operative point is in the Roberts case,
8 is the guy just got up and left, he wouldn't wait?

9 **MS. MAGEE:** The guy got up and left, but it says that
10 he didn't examine him and didn't review his file, and the
11 holding is actually didn't care -- didn't make any kind of
12 care, treatment or diagnosis.

13 **THE COURT:** Well, I understand, but what I'm saying,
14 the distinction between what we have in this case at Bar and
15 Roberts was, that the patient wouldn't wait for the
16 neurologist, just got up and left, of course then he had
17 paralysis.

18 **MS. MAGEE:** Well -- and Your Honor, the distinction in
19 Roberts also is, this was not an on-call physician. It was
20 someone -- a neurologist who is already in the hospital, and
21 so he came down to see the patient, yes, he got a call from
22 another doctor in the hospital, this neurologist was in the
23 hospital, he came down to see the patient. He wasn't the on-
24 call physician so it wasn't like, I'm on call, I get a call so
25 I'm going to come see this patient as a neurologist. He was

1 in the hospital, his doctor colleague called him, he said,
2 come down here and look at this patient, that's what he was on
3 his way to do.

4 In this case ---

5 **THE COURT:** I hear what you say. What I'm really
6 saying is, in **Roberts**, for whatever reason, the gentleman got
7 up and left, then he sued the doctor, and of course the Court
8 held there was no physician relationship. Here, in this case,
9 I don't think Ms. Fay just got up and left, I think, you know,
10 the decision was made, however it was made, that she would be
11 discharged from the Emergency Room, that her care was
12 complete. I'm not arguing with you, I just think that's a --
13 to me, sort of an operative distinction between what has
14 happened in **Roberts** and then what's going on here. I'm not
15 saying that that's, you know, dispositive, I just note that as
16 a distinguishing characteristic.

17 Let me ask you this, what do you say to Mr. Foster's
18 position that at this point you must give all the inferences
19 to the non-moving party -- we haven't even gotten to the
20 testimony yet in the case -- and the consult information from
21 Dr. Law says, "Case was discussed with Dr. Richard Young, on-
22 call urologist, who requests to see the patient on Monday
23 since the patient's pain is under control"?

24 **MS. MAGEE:** I don't think Dr. Law dictated E.R. report.
25 A third party cannot create a physician/patient relationship.

1 **THE COURT:** I agree. I fully understand. What I'm
2 saying is, what I'm looking here is that the inferences in the
3 evidence, at this juncture, construing those in a light most
4 favorable to the non-moving party, and thus taking away from
5 that whatever is -- the Court is required to take away. How
6 do you ---

7 **MS. MAGEE:** It all comes back to the affirmative act,
8 Your Honor ---

9 **THE COURT:** Okay.

10 **MS. MAGEE:** ---And that is not an affirmative act to
11 treat. Under the -- there's a -- you know ---

12 **THE COURT:** And I'm not -- I'm not arguing with you. I
13 mean, please understand I'm not trying to be contrary, but
14 isn't there an inference in that Dr. Young said, you know,
15 I'll see the patient, send her to me on Monday, and accepted
16 the care. I'm not saying that that's what's happened. I
17 don't have that testimony before me. I'm sure we will get
18 into that in trial, but at this point all I have is the
19 inferences in the evidence.

20 **MS. MAGEE:** Even if you agree that happened, Your
21 Honor, that's -- that's accepting the care for future care,
22 not for care at that time to create a physician/patient
23 relationship. The patient could have gone to see another
24 neurologist, she could have chosen not to come in, she could
25 have presented to Grand Strand Urology and seen another

1 urologist in the practice. That is something for future care.
2 That -- you have to look at the facts and the conversation at
3 the time that the conversation took place, and what occurred,
4 and when I was listening to Mr. Foster I heard a lot of things
5 about temperatures, fevers, discharge summaries. I didn't
6 hear really a lot from Mr. Foster about that conversation,
7 which is very clear from the case, that is what you look at to
8 determine what affirmative act was done to create the
9 physician/patient relationship, and Mr. Foster mentioned that
10 this wasn't about what he did do, it was more about what he
11 didn't do. No, that's not what this is about. It's what he
12 did do.

13 Some of the cases -- I think it might have been in the
14 case that Mr. Foster cited, an on-call physician was called
15 from the Emergency Room, and the on-call physician said, I
16 don't feel good, don't call me, which is a complete and total
17 lack of any kind of action, and in that case the Court found
18 that there was no physician/patient relationship.

19 **THE COURT:** All right. Let's do this, Counsel. I'm
20 going to -- well, you want to -- briefly, do you want to give
21 me some excerpts that you think are important to your record
22 here, Mr. Foster?

23 **MR. FOSTER:** Yes sir, I think so.

24 **THE COURT:** Well, let -- Ms. Magee, let me get those
25 and then I'm probably going to stand down and consider this

1 and come back.

2 MS. MAGEE: Your Honor, just ---

3 THE COURT: Go ahead.

4 MR. FOSTER: Go ahead, Ms. Magee. I'm sorry.

5 MS. MAGEE: The portions of the deposition that he
6 wants to read saying we agreed, that Dr. Young and Dr. Law
7 agreed, or made a decision together, it's our position what is
8 clear from their testimony is that Dr. Law did the evaluation,
9 the treatment, the diagnosis, and the decision to discharge.
10 That is clear. Obviously when Dr. Young receives a phone call
11 from the Emergency Room he has to answer the phone, he has to
12 pick it up and answer it, and he's not going to sit on the
13 phone and be silent, so if he wants to play the semantics and
14 say we agreed and that's what creates the physician/patient
15 relationship that's not what the case law says. The case law
16 says that it is an affirmative act.

17 THE COURT: I understand. Thank you.

18 MR. FOSTER: Briefly, Your Honor. I did want to
19 address one thing because I think the Court agreed with her,
20 but in the -- give you the cite, Your Honor -- in Quirk versus
21 Zuckerman, out of the Supreme Court of New York, Nassau
22 County, June, 2003 -- and I'll practice a little headnote law
23 if you don't mind, to shorten it up. "A physician/patient
24 relationship is created when the professional services of a
25 physician are rendered and accepted by another for the

1 purposes of medical or surgical treatment. Generally the
2 existence of a physician/patient relationship is a factual
3 issue for the jury. An implied physician relationship can
4 arise when a physician gives advice to a patient even if the
5 advice is communicated through another health care
6 professional", so, it can be over the phone, and it can be
7 through the other -- the other professional, Your Honor ---

8 THE COURT: All right.

9 MR. FOSTER: ---As is what happened here. Now, just
10 let me briefly go through these deposition excerpts to show
11 you the existence of proof that there was one. Question: Did
12 you ask -- this is out of Dr. Young's deposition. "Question:
13 Did you ask Dr. Law any questions about, did you do this, or
14 did you do that, or why didn't you do this, or why didn't you
15 do that? Answer: No, basically I just reviewed the -- what
16 had done, and basically expressed that I didn't think that --
17 I didn't think we should have done anything differently."
18 There's the "we" again. So, the next one is, "Question: Do
19 the E.R. doctors at Grand Strand have admitting privileges?
20 Dr. Young: No. Question: So if the patient, if he consults
21 with you in regard to a patient, and that the patient is going
22 to be admitted it would have to be upon your orders, correct?
23 I would have to order it, yes. Question: And then you agreed
24 to see her on Monday, even though you didn't have your
25 schedule with you, correct? Dr. Young: Yes, I'm sure I

1 agreed to see her. You know, a patient in acute pain we will
2 see at any time, but -- and I don't know if we specifically
3 settled on Monday that night on the phone, but we admitted we
4 agreed that she would need follow-up care. Question: And you
5 agreed to see her? Yeah. Question: But did you tell him,
6 Dr. Law, that it would be okay to discharge her and to follow
7 up with you on Monday? Dr. Young: Yes, I mean, that's what
8 we decided, that yes, the pain is controlled. Apparently
9 there's no other reason to admit her, she doesn't have a
10 fever, it's okay to go home with the instructions that were
11 given."

12 All right, and then in Dr. Law's deposition, "Question,
13 all right, now you read Dr. Young's deposition, correct? Yes.
14 Question: And you saw where he said that he agreed with you
15 that based on her age and pain control that she was
16 appropriate to discharge; is that correct? Dr. Law, I recall,
17 yes. Question: Do you recall him saying that? Dr. Law:
18 Yes." Now, this is all after they told me they didn't
19 remember what was said. "Question: Is that the way you
20 recall the conversation? From my recollection of it ..." --
21 this is Dr. Law -- "Yes". All right, he said, "That sounds
22 reasonable." And I said -- "Question" -- I said, "After
23 talking to Dr. Young? Dr. Law said, "Yes".

24 Then we go down and they talk -- you know, there's some
25 talk about what they generally do, and what their habit and

1 routine is, and of course they never said -- admitted -- okay,
2 but we continue. "Question: But now you were discussing her
3 presentation, her associated symptoms -- he's talking about
4 what generally happens -- "...and her lab findings and what
5 you intended to do, correct? Dr. Law: That's what I would
6 typically do. I don't recall specifically what I discussed
7 with Dr. Young." But that's what he would typic -- "Question:
8 How did it come about that he agreed with you that, based on
9 the fact that she was in good health and her age and her pain
10 was under control, and that she was able to be discharged and
11 wait until Monday for follow-up how did it come about that he
12 agreed with you on that? Dr. Law: I imagine during the
13 course of our discussion. Question: I mean, did you ask him,
14 did you agree with me that she's able to wait till Monday, or
15 do you think I need to admit her, or do you think she needs to
16 be admitted, or how would you come about eliciting that
17 information from Dr. Young?" I added "Dr. Young". From
18 "him", is what I asked. "Dr. Law: We would have discussed
19 the case and see if there were enough factors there to warrant
20 admission or if the patient would be safe for discharge.
21 Question: And what was his opinion", being Dr. Young. Dr.
22 Law said, "As I recall he agreed that we could discharge the
23 patient home."

24 THE COURT: All right. Counsel, I'm going to stop you
25 there. I think that's sufficient.

1 **MR. FOSTER:** Okay.

2 **THE COURT:** Thank you.

3 Ladies and gentlemen, let me step down for just a moment
4 and consider this issue, and I'll be back momentarily to give
5 you a decision.

6 All right. Thank you.

7 **MR. FOSTER:** Thank you, Your Honor.

8 **(THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE**
9 **THE PRESENCE OF THE JURY.)**

10 **THE COURT:** Just be at ease everyone.

11 All right. The Court has had an opportunity now to
12 further review the Plaintiff's Memorandum, as well as consider
13 the arguments and the law that was presented.

14 Ms. Magee, I'm going to respectfully deny your motion at
15 this point for the following reasons. Under Rule 56 at this
16 juncture I must give all inferences -- I must construe all
17 evidence in the light most favorable to the non-moving party,
18 thus give all inferences to the Plaintiff. The discharge
19 sheet from Dr. Law simply says that the case was discussed
20 with Dr. Richard Young, on-call urologist, who requests to see
21 the patient on Monday. That can be construed in many ways,
22 but if I must construe it in the light most favorable to the
23 non-moving party what that says is that Dr. Young discussed
24 the case, was part of the decision to discharge, he requested
25 to see the patient on Monday, undertaking her care, she signed

1 a medical authorization giving him the records, which said --
2 was her affirmative act in undertaking the care, and for that
3 reason at this point, including what's said in the
4 depositions, the Court declines to grant summary judgment.
5 The motion is denied.

6 And tell me what other issues we have that would be
7 dispositive. I believe that's the only summary judgment
8 motion that was pending.

9 MR. FOSTER: Yes, Your Honor. That -- we don't have
10 any dispositive motions, obviously.

11 THE COURT: All right. So then we'll move forward to
12 the motions in limine, Counsel, if you are ready to take those
13 up.

14 MR. FOSTER: Yes sir. And I would ask Your Honor,
15 would the Court rather hear the more complicated ones first,
16 or the simple one first?

17 THE COURT: Let's -- let's ease into it, and if you
18 will give me the simple ones first we'll do it that way.

19 MR. FOSTER: I figured you would like to do some easier
20 ones for a change, and then maybe we'll switch back.

21 THE COURT: All right. That will be good.

22 Counsel, let me go back on one point. I want to say
23 this to our physicians who are present in the room, as well as
24 Counsel. You know, we don't ever want to get in a situation
25 where any on-call doctor who takes a phone call is going to

1 get sued if there's a bad result. That's not the point of
2 what I'm saying here. At this juncture, with no testimony
3 before me, all the evidence not in, I just simply have to
4 construe what I'm hearing in a light most favorable to the
5 non-moving party, and that gets the Plaintiff beyond the
6 summary judgment standard at this point.

7 All right. Very good.

8 MR. FOSTER: Your Honor, I'll have Mr. Hewitt bring you
9 the law on this motion, but it's pretty simple. I'm not sure
10 you are going to need to read it.

11 The first motion to exclude we have, Your Honor -- and
12 you know, this may be unnecessary, Your Honor, but it -- these
13 are the -- let me just say this about all the motions in
14 limine that I'm going to bring up. These are things that will
15 affect what is said in opening, and these are things that
16 would -- that they may not even intend to ask. I mean, you
17 know ---

18 THE COURT: Well, have y'all discussed this, these
19 motions in limine? I know you were asking for them before we
20 started.

21 MR. TODD: We looked at some of them, some of them I
22 don't think I have any disagreement with. And he had one
23 about us bringing up that the Plaintiff got life insurance.

24 MR. FOSTER: That was the one I was going to start
25 with, Judge.

1 **MR. TODD:** I don't think I'm going to talk about the
2 Plaintiff getting life insurance.

3 **THE COURT:** Okay. How about the other Defendants? I
4 assume that's fairly standard.

5 **MR. AIKEN:** I'm not bringing that up, mentioning that.

6 **THE COURT:** All right. By consent.

7 **MR. FOSTER:** Okay. Your Honor, could we have this
8 admonition? See, here's the problem, and this includes one of
9 the motions to exclude. Mr. Aiken -- we flew up to Milwaukee,
10 okay, for Kelly's step-father and mother's deposition. We
11 initially, I think, tried to see if they could be -- they
12 weren't here, they didn't know any of the facts of what was
13 going on, and we tried to contact them initially to see if
14 they would be damage witnesses, as far as the way they were,
15 Kelly and Sean, that sort of thing, and Mrs. -- her mother,
16 Ms. Webber, I believe it is, was so emotional on the phone
17 that she really couldn't get through a phone call. I don't
18 even think we got to ask her -- we were just talking about it
19 and she was so emotional, so we basically just left them alone
20 because they weren't the personal representatives, and they
21 weren't heir -- beneficiaries under the statute, and they
22 really had no control -- you know, so -- and I couldn't say
23 too much to any of them, so we left them alone.

24 But we go up to Milwaukee and Mr. Aiken was asking
25 several -- you know, Mr. Aiken asked several questions of each

1 of them, for example -- and I've got -- and I can get into
2 this unless he agrees to it. He may have been just -- like
3 me, just giving me a hard time, Judge. I don't know what he
4 intends to do with it. But he's asking the stepfather and the
5 mother if -- let me preface it with this. The night before
6 their depositions all defense Counsel went over and met with
7 the stepfather and the mother of Kelly, and tried their case,
8 showed them portions of medical records, and they won over
9 there with the step-parents, so they were all fired up and now
10 they are blaming Sean. And so part of the questions in the
11 deposition are, do you agree with this lawsuit. Your Honor, I
12 know I don't have to read the definition of relevance to you,
13 but what relevance that could possibly have as to whether they
14 support this lawsuit or not I can't imagine.

15 **THE COURT:** All right, Counsel, this is all good
16 information, but the rules clearly require that, if you are
17 going to make a motion you've got to discuss it with the other
18 side in advance so we don't just come off the top and discuss
19 it and take Court time if it's something that's not an issue.
20 I suspect that's not an issue, but I also suspect it hasn't
21 been discussed, and it should have been.

22 **MR. AIKEN:** Well that is an issue.

23 **THE COURT:** All right. Okay.

24 **MR. FOSTER:** Actually Boone and I did talk about it and
25 he said, yes, he intends to get it in, but ---

1 **THE COURT:** Okay.

2 **MR. FOSTER:** And my -- and you know, Your Honor -- of
3 course I'm now ahead of myself. I told you we were going to
4 do life insurance but that's been consented to, so I'm going
5 to hand that back to ---

6 **THE COURT:** All right. Life insurance is out. Let's
7 go to the next one.

8 All right. Support for the lawsuit.

9 **MR. FOSTER:** Yes sir. Your Honor, this is to exclude
10 any evidence from the family whether the -- you know, the
11 questions in the deposition are to the effect -- I'm not going
12 to read the depositions to you, I don't think I really need
13 to, do you support this lawsuit; no, we don't; did we go over
14 these records last night; yes; do you think the doctors were
15 at fault or did anything wrong; no. Number one, Your Honor,
16 it is absolutely irrelevant. They are not beneficiaries under
17 the statute ---

18 **THE COURT:** Okay.

19 **MR. FOSTER:** ---They have no control over this
20 litigation, whether they support this litigation or not is so
21 entirely irrelevant I don't even know how to describe it, but
22 Your Honor, even if there was some semblance of relevance in
23 that question the prejudicial effect of that testimony would
24 so far outweigh any relevancy that it could possibly have that
25 it should not be admissible in court, Your Honor. That's not

1 the issue here.

2 THE COURT: Okay. Let me hear from Mr. Aiken about
3 what he intends to do with that.

4 MR. AIKEN: Well, I will borrow an expression from Mr.
5 Foster. It just doesn't seem right for Kelly's Mom not to be
6 able to give this Court and jury her thoughts on this
7 litigation. It doesn't seem right for her stepdad who raised
8 her from age eight not to be able to talk about this lawsuit,
9 or her brother to be able to talk about this lawsuit. They
10 are making a huge effort to come down from Milwaukee to try to
11 offer this jury testimony.

12 Now, a couple of things. Mr. Fay was asked, does the
13 family support the litigation. Under oath he said yes. Well,
14 they don't support the litigation. And Mr. Foster keeps
15 asking every witness if somebody is responsible for Kelly's
16 death, shouldn't they be held accountable, and the family
17 says, yes, and Mr. Fay needs to look at himself too.

18 Now other testimony from this family, Your Honor, from
19 Tom Meier, who has raised Kelly since age eight -- that's her
20 stepdad -- he spoke with Kelly on Sunday morning. Kelly had
21 actually called to speak to her mother, and she was at work,
22 and this is his testimony, that Kelly said that she had a
23 slight fever and will be going to the hospital. She didn't
24 say one word about chills on Sunday morning. And after all of
25 this was over and she died they asked Sean, Sean, why didn't

1 you take her to the hospital when she had these fever and
2 chills, and there was never an answer, never an explanation.

3 Mr. Foster is going to make a huge issue about Mr. Fay
4 allegedly calling the hospital Sunday morning and talking to
5 somebody in the E.R.. Well, that was never said to Mr. Meier
6 or anybody else in that family, and they will testify to that,
7 never said one word about calling the hospital on January 27,
8 and they just -- quite frankly I'm not sure that this
9 relationship started exactly how Mr. Foster remembers, and he
10 would be calling her if the shoe was on the other foot. They
11 tried to get Sandy Meier to come, according to her language,
12 be a character witness.

13 MR. FOSTER: No, we did not.

14 MR. AIKEN: That's what she said.

15 MR. FOSTER: We did not.

16 MR. AIKEN: Well, that's what she will say.

17 MR. FOSTER: Well, I'll -- as an officer of this Court
18 I ---

19 MR. AIKEN: No. I said that's what she would say if
20 asked. I'm not saying you asked her.

21 MR. FOSTER: Okay. Right. Okay.

22 MR. AIKEN: That's what she would say.

23 MR. FOSTER: Sorry, Boone. I didn't mean to interrupt
24 you. Go ahead.

25 THE COURT: Early in the process to wear out our Court

1 Reporter.

2 MR. AIKEN: But she was not willing to do that, but she
3 is willing to come here and ask some questions of herself and
4 be able to tell this jury how she feels about it.

5 And that's pretty much the same testimony from the
6 brother. The brother spoke with Kelly on Sunday evening,
7 after she had been sick all day. He asked, is Sean taking
8 care of you. There was not a response. She didn't sound like
9 herself. She just sounded not well, and that's pretty much
10 the substance of his testimony. He is supporting the defense,
11 and her mother is, in essence, the same thing.

12 THE COURT: Well, Counsel, I hear what you are saying,
13 and that testimony about the -- what happened on the day
14 before Ms. Fay passed away is certainly irrelevant and
15 probative, but what about this ultimate issue of, 'I don't
16 support this lawsuit? Now how -- first of all, how would you
17 intend to elicit that?

18 MR. AIKEN: Well, it -- well, do they hold the
19 physicians accountable, as the family, and they will say no.

20 THE COURT: All right. And what -- well, is the back
21 side of that is that they hold Mr. Fay accountable?

22 MR. AIKEN: They -- we'll ask Mr. Fay why he didn't
23 take her to the hospital when they were instructed about the
24 chills and fever, go immediately, yes sir.

25 THE COURT: What -- what precedent or rule do you rely

1 upon to have that come into evidence about how they feel
2 ultimately about the lawsuit?

3 MR. AIKEN: I really have not researched, Your Honor,
4 because I got the motion in limine today, after lunch.

5 THE COURT: All right. I would simply say this to you,
6 and I'll be willing to hear whatever you may bring in tomorrow
7 ---

8 MR. AIKEN: All right.

9 THE COURT: ---But typically a comment by someone, even
10 though they may be somewhat close to the situation as to the
11 ultimate issue of liability -- and this is particularly
12 important in medical malpractice, which it requires an
13 expert's opinion to prove, or I guess to disprove, depending
14 on where you are in the case, the Court would not permit them
15 to simply say, I don't support this lawsuit, or something of
16 that nature, because that would be a comment on the ultimate
17 issue for the jury from someone who is not really qualified --
18 they may have a feeling, but they would not be legally
19 qualified to express that, so that would be the Court's
20 ruling.

21 MR. AIKEN: All right. All right. Thank you.

22 THE COURT: If you've got precedent or rule I'll be
23 glad to hear from you tomorrow on that.

24 MR. AIKEN: Thank you.

25 THE COURT: All right.

1 **MR. FOSTER:** Your Honor, and the other part of that is
2 that they don't hold the doctors at fault. They are not
3 competent to make that testimony. They are not competent to
4 have that opinion as to whether the doctors are at fault or
5 not ---

6 **THE COURT:** Well, I understand. That's what I said.

7 **MR. FOSTER:** ---Nor am I, nor is anybody else in this
8 room that's not a physician.

9 **THE COURT:** That's the import of my ruling.

10 **MR. FOSTER:** Okay. Thank you, Your Honor. So that
11 would be as to both things, they don't support it, and that
12 the physicians were not at fault?

13 **THE COURT:** Of course. I mean, they would not be
14 qualified to testify on that.

15 **MR. FOSTER:** All right. Thank you, Your Honor.

16 And just -- Your Honor, just so the record is straight.
17 Boone has known from the beginning I -- because that was a
18 video taped -- those were video taped depositions, and he's
19 known from the very beginning my objections as to that. I put
20 them on the record in the deposition. I said, I object to
21 this whole business about them testifying whether they support
22 the litigation or whether the doctors are at fault; they are
23 not competent and it's irrelevant.

24 **THE COURT:** Right. Okay. I understand what you are
25 saying. Let's move to the next one.

1 **MR. FOSTER:** Your Honor, can we do this right now,
2 because this is what I was talking about, unringing the bell,
3 and this is the subject of another motion, so I'm not getting
4 into something that's outside, okay, it's something that's not
5 admissible too, but it's something that I've got to bring up
6 to you.

7 The reason -- the timing, as far as I could -- he was
8 saying that Sean said they supported it in his deposition and
9 then they say they don't, the truth is, Mr. Tom Meier admitted
10 to me that he's the one -- he's the very one that encouraged
11 Sean to see an attorney, to see about what happened to Kelly,
12 and to find out, and to go to a lawyer, so for him to -- for
13 them to said Sean said -- the family supports it, and further
14 he's not telling the truth, that's not quite the way it
15 happened. And then in the deposition he told me that I was
16 the one he referred Sean to, so, you know, I just wanted you
17 to know that there is a dispute about what -- you know, this
18 inference that Sean wasn't telling the truth under oath.

19 **THE COURT:** Very good. That's a non-issue, Counsel.
20 That's way off point in where the Plaintiff ought to be
21 heading in this case, and what's relevant to the Defendants so
22 ---

23 **MR. FOSTER:** What I was leading into, Your Honor, was
24 my next motion, okay, on the affair.

25 **THE COURT:** All right.

1 **MR. FOSTER:** And we think this is when -- this is the
2 remarriage, and it has a coattail, Your Honor.

3 This motion -- all right, there was -- and I don't know
4 if they intend to ---

5 Do you intend -- does anybody on the Defense side intend
6 to introduce evidence of an affair?

7 **THE COURT:** Counsel, I'm going to let y'all discuss
8 this off the record. This really is not something -- this is
9 not appropriate courtroom discussion. Why don't y'all step
10 over to the table and y'all talk about it. If it's something
11 we need to have a motion about we will do that.

12 **MR. FOSTER:** Thank you, Your Honor.

13 **THE COURT:** Thank you.

14 **MR. TODD:** Your Honor, well, I mean, I'm -- there's two
15 motions in there, two motions. One is remarriage, not going
16 there. The affair, I think that's admissible.

17 **MR. AIKEN:** Same here.

18 **THE COURT:** All right, then we had a discussion about
19 it, so let's go forward to it.

20 Ms. Scalise, you want to add to that?

21 **MS. SCALISE:** Your Honor, I also agree that -- yes sir,
22 as far as the affair, that directly addresses the
23 truthfulness, his character, and that's a key critical issue
24 for the jury to determine.

25 **THE COURT:** All right. Let's hear what you've got to

1 say about that, Mr. Foster.

2 **MR. FOSTER:** Your Honor, first of all, I don't think
3 the fact that the man made a mistake once in his life in
4 regard to his wife destroys his -- I mean, this man is a
5 Myrtle Beach Police officer, a member of the Coast Guard, and
6 a veteran of this Country's Army. I don't think that goes to
7 establish he's got bad character. I -- to be honest with
8 you ---

9 **THE COURT:** This -- Counsel, excuse me, this affair, is
10 this with -- while married to Ms. Kelly L. Fay, or this is
11 when subsequently remarried?

12 **MR. FOSTER:** No sir. It's Kelly L. Fay, Your Honor.
13 We have -- the case law is, Your Honor, that obviously --
14 obviously, Your Honor, I know you know that the subsequent
15 remarriage is not admissible, which he's been questioned about
16 at length, as well as dating, and none of that is admissible
17 under South Carolina Law.

18 It's -- I mean, we have that in our Brief, Your Honor.
19 You know, citing Moultrie versus Medical University of South
20 Carolina, Wooten versus Amspacker, Smith versus Wells, I mean
21 obviously the remarriage is not.

22 Now ---

23 **THE COURT:** Well, let me just -- let's just think this
24 through before you even get into this. Obviously the
25 Plaintiff is going to testify he suffered a great loss, and

1 part of the damages is the comfort, society and the loss of
2 that with his spouse. Are we going to have testimony to that
3 effect?

4 MR. FOSTER: Yes sir.

5 THE COURT: All right. Well then tell me why is that
6 not responsive.

7 MR. FOSTER: Because of Wooten versus Amspacker, Your
8 Honor, at 279 S.C. 325, ---

9 THE COURT: All right.

10 MR. FOSTER: ---307 S.E. 2d 232, 1983. In that case,
11 Your Honor, in Wooten, the Supreme Court held that the
12 separation, the separation of a husband and wife was not
13 relevant to any damages of the surviving spouse. Your Honor,
14 in that case, when -- they were separated when the death of
15 her husband occurred, and they said that they couldn't even
16 bring in separation, and my point to the Court is, if you
17 can't bring in the fact that your wife left you, or your
18 husband left you, and that come in as relevant evidence to
19 attack damages, then certainly the fact that he had a brief
20 affair, to which he went to Kelly and confessed, was not
21 caught, confessed, they went to marriage counseling. This was
22 over -- this was before she died. This was in 1999 when this
23 happened, Your Honor. She died in 2002. They went to
24 marriage counseling a couple of times. She was suffering from
25 depression before the affair ever happened. That's pretty

1 much going to be the testimony is why it happened. You know,
2 they were having a little difficulty, he did it, he confessed,
3 they went to marriage counseling, they got their ducks in a
4 row, they moved to South Carolina, and they were happy as they
5 had ever been. They got over it, they got by it. My
6 position, and my contention to you is, Your Honor, as far as
7 that affair, notwithstanding the fact the Supreme Court says
8 that even separation at the time of the death is not
9 admissible, that only a strong marriage -- they didn't have
10 children, all they had was a dog -- only a strong marriage is
11 going to survive that. That has no relevance as to whether
12 they loved each other which, by the way, every one of the
13 family members has told me in the deposition -- because he
14 would ask the questions that we were just talking about and I
15 would say, tell me about Kelly, and then I would also ask
16 them, did Kelly love Sean, yes, to a man, to a woman.

17 **THE COURT:** I've got it.

18 Let me hear from defense as to what we -- what you wish
19 to say in reply.

20 **MS. SCALISE:** Your Honor, if it please the Court, as to
21 the issue of the affair, as you just heard from Mr. Foster, we
22 are going to hear countless times the fact that Mr. Fay is a
23 police officer, he's in the Coast Guard, he's a veteran, this
24 clearly goes to his truth and veracity. I think it's very
25 important.

1 Your Honor, I do actually want to argue against
2 precedent. I do understand that the Supreme Court has
3 addressed the issue about remarriage, but I think in this case
4 it is critical that that comes out. Oliver Wood, who is his
5 Economist, has done this Report, and one of the key elements
6 in his report is loss in family services which he values at
7 over Two Hundred Thousand Dollars, and in this it says before
8 she died Ms. Fay performed an average of seventeen hours per
9 week of family services, she performed numerous family
10 services including cooking, washing dishes, laundry, general
11 household cleaning, grocery shopping and lawn and care
12 service. The loss of family services is appraised on a
13 current basis at Eight Dollars per hour, before trial loss in
14 family services is Fifty-One Thousand Four Hundred Eight
15 Dollars, the present value of the after trial loss in family
16 services is a Hundred Sixty-Seven Thousand Six Hundred Ninety-
17 Four Dollars.

18 I think that, without the testimony that he has since
19 remarried and has somebody to perform these activities, that
20 misleads the jury, and potentially their verdict then is based
21 on speculation, thinking that he has not been remarried, and
22 that he has to have somebody to perform these services. I
23 think that is unfair for the jury to not be apprised of the
24 fact of his remarriage.

25 **THE COURT:** All right. Counsel, I'm going to take this

1 under advisement. I'm going to direct you not to go into this
2 on opening. Let me look at these things tonight. Just don't
3 plan your opening around this -- these points. It will come
4 out in testimony if it's allowed. That will give me an
5 opportunity to review and reflect that.

6 Mr. Todd.

7 MR. TODD: Yes sir, Your Honor, and I don't mean to
8 beat a dead horse but I was just going to add, on the matter
9 of the affair I think it is relevant to the testimony about
10 the loss of companionship. What the records will show -- and
11 we were talking with Mr. Foster, and briefly, I thought he had
12 wanted to admit certain records from North Carolina of medical
13 doctors where this affair was discussed, and we agreed to
14 that, but anyway, here's what the medical records show.
15 Medical records show, based on the discussions, is that this
16 affair started in June of 1999. The records also show that in
17 August of 1999 Kelly Fay went to a doctor and says, you know,
18 I'm depressed, I married this man and it's really, just
19 something is not right, and the doctor put her on Prozac
20 because of this depression. Then in December, at that point
21 Sean Fay confessed on December the 17th of '99, that he was
22 having an affair with -- they were working at the same place
23 then -- one of their co-workers and one of their neighbors,
24 and obviously that was a, you know, a pretty severe blow.

25 THE COURT: Is this the same person, or this is two

1 people?

2 MR. TODD: No. This is Sean Fay having -- the co-
3 worker and the neighbor are the same person.

4 THE COURT: Okay. All right. Very good.

5 MR. TODD: One person. And she has remained on Prozac
6 since that time, but the record is clear that the Prozac
7 started because of the problems with the relationship that
8 started with the affair, and that's in the medical records.

9 THE COURT: All right.

10 MR. FOSTER: Your Honor, can I clarify that?

11 THE COURT: Go ahead.

12 MR. FOSTER: I mean, this is what the -- first of all,
13 they are saying I wanted the medical records in. I don't want
14 the medical records in, but if Your Honor rules against me
15 then I certainly want the records in, but he's talk -- right
16 now he's not talking about marriage counseling, he's talking
17 about Dr. Kommu, her physician in North Carolina, and the
18 records will clearly show that she went to him and said they
19 were having marital problems, and was put on Prozac. She was
20 depressed before the affair, Judge. He put her on Prozac
21 before that. She had suffered from depression -- that's why -
22 - that's what caused the affair, I mean, the records don't
23 show that, but if you can infer from that. She goes to him
24 and says she's just not feeling lively, and they progressed to
25 where he says, you know, I think you are depressed, and he

1 puts her on something, and then six months later -- I don't
2 know the date of it -- Monty might remember ---

3 MR. TODD: That's the date.

4 MR. FOSTER: Mr. Todd might remember the date of the
5 visit, but I can tell you this, that the depression started
6 before the affair, or around the same -- or because of -- the
7 affair started because of the depression, but regardless of
8 that, Your Honor, the Supreme Court has already ruled on this.

9 And Judge, in response to Ms. Magee wanting to argue
10 against precedent, I would like to read for you the rationale
11 of the Supreme Court, why they don't let this in, and that's
12 out of -- that's out of the Smith case.

13 THE COURT: Mr. Foster, respectfully, I'm familiar with
14 the public policy and the rationale.

15 MR. FOSTER: Okay. All right.

16 THE COURT: It's not necessary -- I'm taking that under
17 advisement. Let's move to the next issue.

18 MR. FOSTER: Your Honor ---

19 MR. TODD: I was going to say, I'm certain none of this
20 is coming out in my opening statement.

21 THE COURT: Very good. Please, let's do not go into
22 this in opening, but I'll have an answer for you most likely
23 first thing tomorrow.

24 MR. FOSTER: Okay. I'll move on to the next one, Your
25 Honor.

1 Your Honor, can I read this one visit into the record
2 from Dr. Kommu about that last motion on the depression?

3 **THE COURT:** Go ahead. Counsel, how many more motions
4 do you have?

5 **MR. FOSTER:** Just a couple.

6 **THE COURT:** All right. Go ahead.

7 **MR. FOSTER:** This is dated August 18th, 1999, Your
8 Honor, Kelly Fay is seeing Dr. Kommu, and that's K.o.m.m.u., I
9 believe.

10 "A twenty-three year old who is here to discuss crying
11 spells that she's been having over the last one and two
12 months. Of note, her father has had significant psychiatric
13 history in the past, in fact, has attempted suicide
14 previously. In addition, her mom was an alcoholic and she
15 states that because of -- because the eldest she had to take
16 care of her younger siblings. She has been married for four
17 years, but has been in a relationship with Sean Fay for the
18 last six. She feels that they are both compatible and they
19 get along very well. Over the last one to two months she has
20 difficulty trying to focus at work and has had some trouble
21 with crying very easily. She has been more irritable. She
22 feels symptoms definitely get worse prior to her cycle, and
23 seem to improve somewhat afterwards. She has had some
24 difficulty sleeping over the last week, but in general has not
25 had a tremendous amount of trouble. She does not get involved

1 in activities very well. She states that generally she's a
2 very positive person, leaving notes for herself across her
3 desk, but lately she has not been at all interested. She has
4 been very withdrawn and eating by herself. She does not work
5 in the same office with her husband, although they are in the
6 same department. They generally have different work duties."
7 She is not excited -- "She is not as excited about seeing him
8 in the evenings when he comes home. They have also been
9 having some mild marital difficulties." And his assessment
10 was major depression.

11 Your Honor, the next motion we have -- Your Honor,
12 before we leave the parents I need to tell you this, before --
13 even before you make your decision because, you know, we might
14 get ---

15 **THE COURT:** Before we leave the parents? What did you
16 say?

17 **MR. FOSTER:** Before we leave the issue of the parents.
18 Well, I tell you what, we will wait till you ---

19 **THE COURT:** We are not discussing the parents, are we?
20 I may have missed something but I'm -- okay. Go ahead. Let's
21 move to your next one.

22 **MR. FOSTER:** I'm backing up on you.

23 **THE COURT:** All right. Let's keep moving forward
24 actually, Counsel.

25 **MR. FOSTER:** Okay. And I just wanted to ask the Court

1 that before these witnesses take the stand they be admonished,
2 because they have an agenda, and somebody will blurt -- for
3 example, I asked the brother, did Sean love Kelly, and he
4 blurts out, inappropriately, well, then why did he have an
5 affair, or something to that effect, or how can you love her
6 if you had an affair, you know, and you know where I'm coming
7 from on that.

8 All right. Now, Judge, this next motion in limine is
9 off of -- Sean Fay was -- before he -- before he joined the
10 police force he was a computer guy, and he did computer for
11 the -- computer -- I don't know enough about computers to tell
12 you what he did, but he was a computer geek so to speak, all
13 right, and he had on the computer a blog, where he would go on
14 -- I don't know if Your Honor knows what a blog is or not. I
15 didn't know what a blog was until I heard this, but I sure
16 know what it is now, Your Honor. But at any rate -- at any
17 rate, he had this blog, and when Ms. -- I believe it was Ms.
18 Fowler that was taking his deposition, she asked him if he
19 kept any notes ---

20 MS. SCALISE: Scalise.

21 MR. FOSTER: Ms. Scalise, I mean, I'm sorry.

22 MS. SCALISE: I've been Magee, Fowler.

23 MR. FOSTER: She asked him if he had any notes,
24 diaries, etcetera, and he told her about the blog, okay. On
25 the blog, apparently at some time he had communicated -- he

1 had never visited Marion Fowler about taking his case. Marion
2 did not take this case and he blogged about it and said Marian
3 did -- you know, news from the attorney, and I'm not quoting
4 it, but we can -- I think we've attached it, Your Honor, to
5 the motion that we've handed up. But at any rate, the bottom
6 line on it is this, Judge, they want to get into evidence that
7 Marion Fowler turned his case down, and that he's an E.R. doc,
8 because he said in his blog he had been an E.R. doctor for
9 eight years, and he didn't think it was a case, and that she
10 was healthy when she was left, and Sean went on to say, what a
11 relief that is to know that it wasn't anybody's fault and I
12 don't have to blame somebody for her death, and it -- you
13 know, it was just God's will, and that sort of thing.

14 **THE COURT:** All right. Let me just make sure I
15 understand. Your client is discussing all of this on a blog.

16 **MR. FOSTER:** Yes sir. Unfortunately, yes.

17 **THE COURT:** And unfortunately would be correct.

18 Now, what say the Defendants of this? Let me hear from
19 the -- let me just get their position before I understand how
20 this is going to gel here.

21 **MS. SCALISE:** Your Honor, we totally agree that he has
22 waived any right to attorney/client privilege by putting it on
23 the world-wide web. I mean, this is something anybody who
24 typed into SeanFay.com could have accessed. This is back June
25 5th, 2002, and we took his deposition 2004 and he was still on

1 there, so anybody who wanted to look at it could have read
2 that.

3 MR. FOSTER: Your Honor, we are not moving on the
4 attorney/client privilege.

5 THE COURT: All right. And so you -- all you are
6 trying to exclude is that he went to see Marion Fowler?

7 MR. FOSTER: What I'm trying to exclude, Your Honor, is
8 them reading this blog that he went to see another lawyer who
9 turned his -- in fact, he never saw Marion Fowler. He talked
10 to him on the phone ---

11 THE COURT: Okay.

12 MR. FOSTER: ---Who turned his case down, which is
13 totally ---

14 THE COURT: Well, let me stop. Counsel, is anybody
15 intending to put that up, that particular portion of the blog
16 in?

17 MS. SCALISE: We may, Your Honor, and I think that the
18 important thing is, in this blog it goes through what all
19 transpired with Kelly, and as you will see as the case
20 progresses, Sean Fay has lots of different blogs, and are lots
21 of different things that he has written about what occurred
22 with Kelly, and I think it -- when you are combining those and
23 deciding what really happened you have to look at all of them.

24 THE COURT: All right. Well, let's just then focus in
25 specifically, what is it about the consult with another

1 attorney who happens to be a physician would be relevant to
2 this case?

3 **MS. SCALISE:** Well, in his blog he said Kelly was
4 healthy when she left on Saturday. But in this blog it just
5 happens to be the same lawyer called, he's also addressing the
6 fact that Kelly was healthy when she left the E.R. on
7 Saturday.

8 **MR. FOSTER:** He's saying Marion said.

9 **THE COURT:** Well, of course that's not really relevant.
10 Mr. Fowler wouldn't know that. I -- you know, he's -- he
11 would ---

12 **MS. SCALISE:** Well, no. He says that, all the medical
13 reports indicate this.

14 **THE COURT:** Well, all right.

15 **MS. SCALISE:** Said he had never seen anything quite
16 like this unique before, and that no twenty-five year old
17 otherwise healthy female should not die in two days from
18 complications of a kidney stone, however, it appears to him
19 that on Saturday they did what they would normally do.

20 **THE COURT:** All right. Let me just -- just as I would
21 exclude what some physician may say offhand unless they are
22 brought in here as an expert witness, placed under oath -- I
23 don't know if you intend to do that with Mr. Fowler, but this
24 is a hearsay comment, although it is by the -- by a party, I
25 just don't believe it's appropriate for what another attorney

1 slash, person with medical training, said about the case. I
2 would exclude that, Counsel. I'm not saying the blog is going
3 to get excluded. I'm just simply saying, that portion I
4 really think -- first of all, I think it's not admissible
5 because it's hearsay, but secondly, it's just prejudicial and
6 it's not relevant. So I'm going -- and we may have to sit
7 down and get this thing out and start parsing sentences, but
8 the reference -- what I have before me over here is the fact
9 that the Plaintiff went to see Marion Fowler, and Marion
10 Fowler turned his case down, the Court would exclude that. I
11 just don't think it's relevant. I mean, there may have been
12 other defense lawyers in this case as well, I'm just not
13 aware, but I don't -- I would exclude that.

14 MR. FOSTER: Your Honor -- and I appreciate that. Can
15 I put something else sustaining on the record for that, Your
16 Honor?

17 THE COURT: Well, you just won. I would move on.

18 MR. FOSTER: Marion -- well, two things. Marion
19 Fowler, number one, has not been listed as a witness by
20 anybody, okay, and number two, if Marion came in and
21 testified, even though the client -- the rules of professional
22 conduct, if he -- he cannot come in here and testify to
23 anything he said in regard to that, and that's all I want to
24 say. He would be violating ethical ---

25 THE COURT: All right. Please move to your next

1 motion.

2 **MR. FOSTER:** All right, Your Honor. Your Honor, this
3 goes along with Dr. Fowler thing, because they keep calling
4 him Dr. Fowler in there.

5 Okay, now, this is one that I'm making right now because
6 I know it may come up, because I've been through it before.
7 Okay. I went through it with Marion Fowler on the other side
8 in a trial, if you understand where I'm coming from, and ---

9 **THE COURT:** All right. Well, let me stop you. Have
10 you discussed it with the other side, what you are getting
11 ready to say? I'm going to decline to take it up if you
12 haven't.

13 **MR. FOSTER:** Randy has got an M.D. -- Mr. Lee has got
14 an M.D. too, Your Honor, and I just want -- you know, he's in
15 here in his capacity as a lawyer, and I just don't want them
16 walking around in the courtroom saying Dr. Lee, because that's
17 certainly prejudicial.

18 **MR. AIKEN:** Never thought of it.

19 **THE COURT:** Congratulations on attaining that ---

20 **MR. FOSTER:** Been calling him Dr. Lee all morning, Your
21 Honor.

22 **THE COURT:** ---That level of education, sir.

23 All right, next, if any.

24 **MR. FOSTER:** This is a kind of complicated one, Your
25 Honor. I apologize.

1 MR. AIKEN: What is it?

2 MR. FOSTER: This is a motion to exclude.

3 THE COURT: All right. Have y'all discussed the motion
4 to exclude?

5 MR. LEE: Well, we were made aware of this motion as we
6 were heading out to lunch.

7 THE COURT: Have you all discussed it?

8 MR. FOSTER: We did, Your Honor, and they certainly
9 intend to get this into evidence. I'm not going to read my
10 Brief, I'm not going to read a bunch of law to you, because I
11 think it's in your discretion, Your Honor, and whatever you do
12 is going to go with this, but let me explain to you. Attached
13 to our motion you will see correspondence by me, and we do
14 have law -- I think there is law to you, unless I've kept law
15 from another case.

16 But -- oh, and Judge, by the way, when you read my
17 letters, I don't know why the font was that big. I wasn't
18 screaming at anybody. Everybody kept writing me and said, why
19 are you screaming at me. I don't know how the font got that
20 big on my email. It didn't show up on my end that way, so I
21 don't know how it ended up on the other end that big, but I'm
22 sure it's something I did wrong with the computer.

23 But essentially it's this, Judge. We started this
24 case -- why I'm trying to exclude are slides from the autopsy,
25 and/or tissue blocks from the autopsy. Here's what happened,

1 Judge. I got a letter from John Brad -- well, it started out
2 with a letter from him, asking me -- now John Bradley, Monty's
3 part -- Mr. Todd's partner, okay, wrote me a letter asking me
4 if I knew -- if I had -- he said, I represent the hospital and
5 I know I can get these slides from the hospital, but first I
6 wanted to check with you and see if you had them. Now that
7 didn't make any sense to me, and I don't have a response to
8 Mr. Bradley, who is one of my ex-partners. I suspect I didn't
9 answer him because I didn't know what he was talking about,
10 and it looked -- it just sounded -- I had no idea that the
11 hospital -- I thought any -- they own the medical records, but
12 they don't own slides under HIPAA. They do not own tissue
13 blocks of somebody's body. I naturally assumed -- never
14 having defended a hospital in my life I naturally assumed that
15 that would be disposed of as a biohazard. I wouldn't think
16 that somebody would hang onto autopsy slides, although the
17 autopsy report does say slid -- now that I go back and look I
18 understand that it says, but it was never divulged to me in
19 discovery that they had tissue blocks, or that they had
20 slides, and I had taken already -- I think I've already taken
21 the guy that -- the pathologist for the hospital that did the
22 autopsy, I've already taken his deposition, and he made no
23 mention of any slides, no mention of any tissue cuts, so then
24 John says, yes, I just wanted to check with you before I call
25 my own client to see where these slides are, because I've got

1 an expert that wants to look at them. I didn't know what that
2 meant, so -- but anyway, I didn't answer it. Time goes by and
3 they notice the deposition of a Dr. Proia at Duke, who is a
4 pathologist, so -- and in the interrogatory answers, as I
5 recall, they said he would testify from the medical records.

6 If anybody can give me any disagreement on that I'll
7 stand corrected, but I believe he said he's going to testify
8 to the medical records, so I drive up to Raleigh. I had
9 already taken Dr. Proctor's deposition and there wasn't really
10 anything there. I asked him -- I asked Dr. Proctor, the one
11 that did the autopsy here for Grand Strand, I said, is there
12 any way that you can tell anything about the timing of this,
13 or anything like that, that would help us to determine one way
14 or the other. No, I couldn't but maybe somebody in academics
15 could. Well, I kind of think that wields emotion. They
16 didn't mention -- they didn't mention the slides before -- so
17 I go to Dr. -- when I start to take Dr. Proia's deposition he
18 starts talking about slides and tissue blocks, and I'm sure I
19 looked like I was going insane, and then he's talking about
20 slides that he cut and made off of those tissue cuts, okay,
21 so, I mean, I've never seen a chain of custody on these, one,
22 number two, again, it's a violation of Federal Law that we
23 have.

24 And I think we've handed up, have we not? It's a
25 violation of Federal Law for them to transfer, Judge, these

1 tissue blocks and/or slides of her body without Sean Fay's
2 prior consent, or at least a court order or something. There
3 was nothing, so ---

4 **THE COURT:** Well, help me think this through. How are
5 you hurt by this? What's in here that's damaging?

6 **MR. FOSTER:** Well, that's -- okay. I'm going to tell
7 you. He says he -- here's what Dr. Proia says. He does
8 autopsies too. He says, now -- he -- now, keep in mind that
9 Dr. Proctor that's here, that I took his deposition, he's a
10 forensic and an anatomical ---

11 **THE COURT:** And he's been in my court a hundred times.
12 I know Dr. Proctor well. Go ahead.

13 **MR. FOSTER:** So he couldn't answer the question, but
14 Dr. Proia says, off the slides that he made off the original
15 slides, because he didn't like the original slides that were
16 made off the tissue blocks, that he can look at that under a
17 microscope and in his opinion that the infection couldn't have
18 been more than twenty-four hours old, so see, that would put
19 it -- so what they are trying to do is time it to where it
20 didn't happen at the hospital.

21 Now, let me tell you a few other things about Dr.
22 Proctor's deposition, and his Autopsy Report that you can see
23 in and of itself. Number one, they don't even know which
24 kidney the slides are from. He didn't label them. He didn't
25 label which kidney, anywhere in the autopsy, about -- that she

1 -- that he opined was the nidus of the infection that killed
2 her, didn't tell us whether it was right or left, okay.

3 John Bradley is asking me for the slides, okay, when his
4 own client is the one that, if anybody should have been in
5 possession of them, should have been in possession of them at
6 the hospital. Then all of a sudden they show up at Dr.
7 Albala, so they had to get somehow from the hospital to Dr.
8 Albala, and I believe it was through -- I believe it was
9 through Mr. Lee's firm, and then they go to Dr. Albala. Well,
10 obviously, after Dr. Albala tells me that -- and I'm just --
11 I'm sitting there like a knot on a log because I didn't do any
12 research or anything else. I think he's testifying from the
13 medical records. I come back and I start asking for the
14 slides. I said, well since, you know, he said that, I want --
15 you know, I want these slides so I can get an expert to look
16 at them, and tell me what in the world is going on her, and it
17 took me nine months, Your Honor, to get these slides. I kept
18 getting excuse after excuse. It -- we don't want these --
19 they are so fragile, and they are so potentially contamin --
20 and I'm paraphrasing -- they are so potentially contaminated,
21 we don't want to put them out in the heat, and we don't want
22 to do this, and we don't want to send them to you Fed Ex, and
23 all that, and then I finally got mad after nine months and I
24 wrote a pretty sharp letter, I admit it, and I wrote it to
25 Mike Allen and his firm, and I said, look, you know, I'm tired

1 of begging, and if I don't get these things then I'm going to
2 have to go to court; I don't want to go to court crying and
3 whining and fighting with other lawyers about giving each
4 other evidence, but nine months is plenty of time for you, you
5 know, and when I wrote that letter, Mike got it, we called up,
6 we kissed and made up, you know, he said I apprec -- you know,
7 we -- I told him I apologized for the tone of the letter and
8 he said he would get -- and then all of a sudden there was no
9 problem Fed Ex-ing these slides to me.

10 My point is, number one, I have serious concerns about
11 Mr. Bradley asking me where the slides were. I have serious
12 concerns that the slides are not labeled as to which kidney
13 they even came from. I have serious concerns about the chain
14 of custody and the transport between lawyers' offices, because
15 I'm pretty sure they were in Mr. Lee's office for a good
16 period of time, not in a doctor's hands, not in the hospital's
17 hands, but in their hands.

18 Now I finally got them, and then we shipped them to Dr.
19 Stratton up at Vanderbilt, and he shipped them back, and then
20 we shipped them to Dr. -- and the -- but I have serious
21 concerns about them not knowing where they were, not knowing
22 which kidney it is ---

23 THE COURT: I've got -- I understand. You multiply
24 have explained it.

25 All right. First of all, the only thing I heard in all

1 that that may bear on the admissibility as opposed to the
2 credibility or believability is the chain of custody. What's
3 the issue -- or what's your response on that issue, Mr. Lee?

4 **MR. LEE:** Your Honor, I'm going to address that a
5 couple of different ways. Number one, Mr. Foster indicated
6 that he was unaware there were blocks of tissue. If you made
7 reference to the Pathology Report it says blocks number, which
8 tells you that the tissue was, indeed, preserved, and that
9 they were available.

10 And you've had these records for several years, and
11 that's page eighty-four and eighty-five, date-stamped, would
12 indicate all the various organ systems where they have blocks
13 of tissue where you can slice off small pieces to make slides,
14 so, to contend that somehow you are unaware of it, I -- again,
15 I'm not quite sure on why that would be if you have the
16 medical records.

17 Now, specifically, as it relates to the issue of chain
18 of custody. Your Honor, in every hospital that I'm aware of it
19 is the custom and practice of the Pathology Department to
20 maintain slides, blocks of tissue, and to send them out if
21 needed.

22 Now, he indicated there is some HIPAA issue, and I --
23 again, that's a novel approach, but that's not something that
24 has held up over time, and if he is going to argue a HIPAA
25 argument technically he would have to do that within a hundred

1 and eighty days, as Your Honor is well aware.

2 But directly responding to your question there are a
3 couple of ways you can approach that. Number one, bring Dr.
4 Proctor in. His Honor has had him a number of times. He
5 talked about the customs, practices, and exactly how it is
6 that they take these cuts, if you will, how they preserve
7 them, and what was used on these particular slides. And the
8 alternative, if Counsel is really concerned about the fact
9 that these slides are what we say they are, he can do DNA
10 testing, and that's a bit absurd. We don't need to do that
11 necessarily. But he's had these slides reviewed by two
12 pathologists and we've taken the depositions, and neither one
13 of them raised an issue of whether it was adequately
14 preserved, whether they could interpret the slides, so that's
15 why I'm a bit confused about that.

16 So as it relates to -- if he has a major concern about
17 the chain of custody, frankly, we can take additional cuts.
18 We have made some calls to the hospital. They still have the
19 blocks, and what we can do is take a look at those slides,
20 compare them to what Dr. Proia looked at, and erase all those
21 issues.

22 **THE COURT:** Well, first of all, I don't know that the
23 time remains to do these things, but Counsel, I'll just have
24 to refresh on the law, that I expect the attorneys to be able
25 to refresh me on whether or not a chain of custody, or what

1 level of chain of custody is necessary for the physicians to
2 testify about what they discovered on the slides, and I'll
3 just hear from you tomorrow. I mean, if there is a -- if they
4 are going to bring that up, and they've got to -- and they've
5 got to prove the chain, well, that's just up to them. If they
6 don't do it -- I can't exclude it now. I don't know whether
7 they have it or not. I'll just have to wait till we get
8 closer to that and made that decision.

9 MR. FOSTER: Well, Your Honor, here's the -- here's the
10 problem I anticipate with that -- and I appreciate him not
11 understanding that -- me not understanding the medical
12 records, however, if I had been to medical school I probably
13 would have known what a block and a slide was of an autopsy,
14 and maybe I should have been -- maybe I should have known that
15 as a lawyer, but I didn't, okay. So, I mean, if I should have
16 known and I didn't that was an honest mistake. Never
17 represented a hospital in my life. I don't -- as I recall --
18 no, I have not.

19 So, no, I didn't know there were slides, but
20 nevertheless, even if I do -- you know, it's just like your
21 first interrogatory, Your Honor, it doesn't ask you who you
22 are going to call as a witness, it asks you who -- who do you
23 know that knows anything about this case, not who you want to
24 call, and they have a duty to disclose to me, especially
25 before I go and take a man's deposition, that he's made slides

1 and he's going to be testifying about those slides so I can
2 maybe consult with one of my experts and know some intelligent
3 questions to ask him.

4 **THE COURT:** Well, I would expect that the Plaintiffs
5 would have hired a physician expert who would be reviewing the
6 records, who would be aware of these things.

7 But Counsel, before I get into all that, this is really
8 sort of a morphus. I don't know whether you are going to call
9 him, I don't know whether you are going to have the chain, I
10 don't know what level of chain is required as I'm sitting
11 right here at first impression, just having heard this, so
12 we'll just have to take that up contemporaneously when it's
13 getting ready to happen, and just direct you again not to go
14 into opening argument on these issues. I doubt this would be
15 opening material, but we'll just have to see how that evolves.

16 **MR. FOSTER:** And Your Honor, if you don't mind, that I
17 just add that -- let Mr. Lee go first. I'm sorry. I've
18 talked a lot.

19 **MR. LEE:** Number one, Dr. Proia was deposed in 2007,
20 which I think is important as it relates to your concern about
21 whether you can authenticate a chain of custody on whether or
22 not there were additional samples that could have been tested.
23 Your Honor, ultimately the issue in this case relates to the
24 fact that this patient died of an infection, and the question
25 that the jury has to answer, hopefully using scientific data

1 and evidence, is when, exactly, did this infection occur. The
2 only evidence we have, the only objective evidence, in under
3 the laboratory data, and these slides, otherwise the experts
4 are going to speculate concerning the timing, because there is
5 nothing else in the records that they can really refer to, so
6 to the extent that Counsel wants to, in essence, remove the
7 objective evidence and data, I think that puts the jury in a
8 tough position to make a decision in a medical malpractice
9 action.

10 **THE COURT:** I hear what you are saying, and again, we
11 are going to decide it based on the rules of evidence and the
12 level of chain of custody required, and we'll just make those
13 decisions when we get there. All right.

14 **MR. FOSTER:** Your Honor, can I just briefly state my --
15 just a little defending myself?

16 **THE COURT:** Well, actually I think -- I think I'm going
17 to stop us there, because I understand where we are. We will
18 quite there, and it's five o'clock, and so let me just simply
19 ask -- we haven't even gotten to the Defenses' motions in
20 limine. How many -- does the Plaintiff have any more? Is
21 that it?

22 **MR. FOSTER:** I think we are done, Your Honor.

23 **THE COURT:** Are there Defense motions in limine?

24 **MR. TODD:** Yes sir, Your Honor.

25 **THE COURT:** How many are there?

1 MR. TODD: I have two.

2 THE COURT: All right. How about from others?

3 MR. AIKEN: No sir.

4 MS. SCALISE: No sir.

5 THE COURT: All right. Just tell me, have you
6 discussed those with the other side?

7 MR. TODD: Briefly, Your Honor. And I can state them
8 very succinctly, Your Honor.

9 THE COURT: Go ahead.

10 MR. TODD: Succinct is a relative term. There are two
11 motions, two motions. One is on May 13th, Thursday afternoon,
12 we received Supplemental Responses to Interrogatories. One
13 attachment was a Incident Report from Grand Strand Hospital
14 for something that occurred on April of 2005, and just looking
15 at the Incident Report it paints a bad picture. Apparently
16 there was a patient in the E.R., the E.R. doctor asked that he
17 be transported -- or taken off hospital grounds, and he was,
18 and there was an Incident Report, and, you know, in reading
19 that it doesn't look good. Now, if the Plaintiff wanted to
20 try that case then that would be a pretty good case for him to
21 try, but it doesn't have any relevance to this case.

22 THE COURT: All right. Very good.

23 What is this the relevance of this Incident -- National
24 Standard Incident Report?

25 MR. FOSTER: Your Honor, the only relevance that I

1 thought that had -- and I cannot cite you a page and number,
2 but I will tomorrow if you are inclined to want to know, is
3 that during one of the depositions -- when I was deposing
4 these nurses I deposed -- you've got to understand, the same
5 nurse crew was there on Sunday as was there on Saturday, so --
6 and you will hear a lot more about the call back on Sunday.
7 But when I was deposing these nurses one of these nurses made
8 the comment -- I said, well, you know, why didn't somebody
9 just put a thermometer in her mouth before she -- if a fever
10 and a kidney stone is an emergency why can't somebody just put
11 a thermometer in her mouth and measure it after she had been
12 there for four hours so you didn't send her home in an
13 emergency situation, and -- something to that effect, and one
14 of them told me something -- and I'm paraphrasing now --
15 something like, we would never do such a thing, or you know,
16 it was in response -- maybe it was in response to some other
17 question, but they -- that Grand Strand was above that, that
18 they would never do such as thing, as that's just impossible
19 that they could make a mistake like that. And you know, I
20 don't know whether it would come in, whether I can make it
21 relevant or not, but I sent it to them ---

22 **THE COURT:** Are you talking about the Incident Report
23 where someone was removed from the hospital grounds?

24 **MR. FOSTER:** And dumped on the side of the highway, yes
25 sir, in news reports. It may come in later, if I can make it

1 relevant. I don't know if I can, Judge, but I just provided
2 it them so that if I can I can get it into evidence.

3 THE COURT: All right. It sounds, at this juncture,
4 highly questionable, but we will see. All right. Very good.

5 MR. TODD: And I'll state the grounds for -- if you are
6 going to need to go there, or do you want me to wait? I can
7 state four grounds for exclusion. It's hearsay, there is no
8 relevance, late disclosure, and it would violate Rule 403.

9 THE COURT: All right. Very good. All right. We will
10 just -- I'm going to give you this back, Mr. Todd, and we will
11 take that up -- that seems to me kind of extraneous to what we
12 are doing here.

13 MR. FOSTER: Can I add one other thing, Your Honor? In
14 that Incident Report is involved Collette Farrelly, which is
15 was one of the nurses involved at Grand Strand that I
16 deposed ---

17 THE COURT: All right.

18 MR. FOSTER: ---And she was the one running outside,
19 because see, the Highway Patrol caught this on video cam,
20 okay, they caught these -- they caught two security guards
21 dumping a patient on the side of the road ---

22 THE COURT: All right.

23 MR. FOSTER: ---And then -- so they called -- the
24 Highway Patrol called the police to come investigate, and one
25 of the nurses, Collette Farrelly, was the one running around

1 telling everybody, do not talk to the police.

2 **THE COURT:** All right. Very good. Thank you, Mr.
3 Foster. I just don't -- I'm not sure of the relevance of it.
4 But go ahead to your next motion.

5 **MR. TODD:** The next motion in limine is, on Thursday
6 afternoon, May 14th, 13th, we received, as a Supplemental
7 Response to Discovery, a preliminary evaluation of financial
8 information and data on HCA.

9 **THE COURT:** All right.

10 **MR. TODD:** HCA is not a defendant. Their financial
11 information and data is irrelevant. It was ---

12 **THE COURT:** All right. HCA is -- are they the owner of
13 Grand Strand Regional?

14 **MR. TODD:** Yes sir. They are the parent corporation.
15 It's a separate corporation, but they are the parent. But
16 their financial data is not relevant to this case. It was
17 late production and late disclosure, and we just got it
18 Thursday afternoon, and whatever probative value it has it
19 goes into things about what the -- you know, the pay of the
20 executives are, what the -- you know, all this financial data,
21 but it's not relevant. What the -- this is not a punitive
22 damage case, but even if it were, HCA's financial information
23 is not relevant, it would be Grand Strand's.

24 **THE COURT:** I understand. Are you asking for punitive
25 damages in this case?

1 **MR. FOSTER:** Yes, we are, Your Honor.

2 **THE COURT:** All right. And tell me, what is the
3 relevance, just in a nutshell, of HCA?

4 **MR. FOSTER:** Dr. Wood has been recognized, Your Honor,
5 by the South Carolina Supreme Court -- and I can't remember
6 the name of the case right now, off the top of my head, but
7 you probably know it better than I do -- as to be able to
8 testify as to the ability of the defendants to pay punitive
9 damages, and that's all the report was. He amended his
10 original normal report and put in there those figures, and
11 came to the conclusion that Grand Strand can pay punitive
12 damages, or they have the ability to pay punitive damages in
13 this case.

14 **THE COURT:** Well, I think you missed the point. He
15 says that Grand Strand and HCA are two separate entities. How
16 do you get HCA's evidence in is what I'm asking you?

17 **MR. FOSTER:** Through Dr. Wood.

18 **THE COURT:** How is it relevant? I understand it comes
19 in through Dr. Wood.

20 **MR. FOSTER:** HCA owns Grand Strand, and therefore ---

21 **THE COURT:** I understand that too, Mr. Foster.
22 Everything you tell me I understand. What I'm asking you,
23 please, is how do you get the parent corporation's information
24 in when you are not putting in the Grand Strand's information,
25 apparently? Well, first of all, are you putting in Grand

1 Strand's as well?

2 MR. FOSTER: I would like to ask ---

3 THE COURT: You have it -- you have that to put in?

4 MR. FOSTER: No sir. We don't have it. No sir.

5 THE COURT: Okay.

6 MR. FOSTER: We don't have their net worth, but I sure
7 would like to ask that question. Yes.

8 THE COURT: Well, why are you putting in a separate --
9 a parent corporate entity and not the Grand Strand Regional's
10 LLCs?

11 MR. FOSTER: Because they are owned by them, and that -
12 - and the ability of Grand Strand to respond to punitive
13 damages, Your Honor. That's the only reason. That is the
14 only reason.

15 THE COURT: All right. Do you have precedent that
16 would allow you to put the finances of the parent in in the
17 place of the sub?

18 MR. FOSTER: I do not, but if we can find it I will
19 have it for you here in the morning, Judge.

20 THE COURT: How about look at that tomorrow. We won't
21 have to go into our opening as well, and let me just take a
22 look at that.

23 MR. FOSTER: No sir. I had no intention of mentioning
24 that in opening, nor do I have any intention of mentioning
25 that Incident Report or anything about it in opening.

1 **THE COURT:** All right. I've actually had that issue
2 before, with Dr. Wood I may add, come up in other medical
3 malpractice -- in another medical malpractice claim.

4 All right. Is there anything else we need to discuss
5 before we close these proceedings?

6 **MR. TODD:** None from Grand Strand, Your Honor.

7 **MR. AIKEN:** No sir.

8 **MS. SCALISE:** Nothing, Your Honor.

9 **THE COURT:** All right then, ladies and gentlemen, let
10 me talk with you a moment, it's only going to take a minute or
11 two because it's time for us to go, some disclosures and other
12 information I want to give to you. First of all, I heard the
13 name of Dr. David Albala. I am a prostate cancer survivor.
14 Dr. Albala was my surgeon at Duke when I went to Duke for
15 prostate cancer surgery, and I simply disclose that on this
16 record for whatever purposes you all may wish to make of that.
17 It would not be my intention to discuss that at any point with
18 the jury. I really don't go around discussing that in the
19 public that much, but I felt you should know that I do know
20 Dr. Albala, and have a professional relationship with him as
21 his patient.

22 Is there anyone who wishes to make a motion to recuse,
23 or some other response I'll be glad to hear from you now.

24 All right. Hearing none, let's just talk a little bit -
25 - since we are going to spend the next six or seven or eight

1 days together let's talk a little bit about how I would like
2 for this trial to run, and what I expect of you all, and what
3 you might expect of me.

4 First of all, I want to be prompt with the jury. When I
5 tell the jury I'm going to do something for fifteen minutes,
6 or give them a break for twenty, or start at 9:30 then I
7 intend to do that. That's out of respect for the jury who is
8 leaving their private lives and coming here for a very
9 important and high civic duty. So tomorrow morning, for
10 example, I told them we would start at 9:30. I will be in the
11 courthouse by nine, certainly no later than 9:15. If you all
12 need me in advance then let me know that in advance so at 9:30
13 I don't come out and someone say, we have a motion, we have
14 issues we need to take up while the jury sits back in the back
15 and waits on that. That would not be my intention, and I do
16 ask for your cooperation in being prompt with the jury.

17 Objections. This is not our first trial, ladies and
18 gentlemen, and one of the good things about this multi-week
19 docket that I've been privileged to administer this year is
20 that we have lawyers who are well experienced, who know what
21 they are doing. Speaking objections are not permitted, nor
22 are they tolerated. All I need when I have an objection is
23 the word objection, and a one-word description, whether it's
24 hearsay, 403, whatever it may be. Please do not stand up and
25 make a speech to preface your objection.

1 Microphones. Let me say to you, remember, on -- when
2 you are seated at your table you are on mike. Your mikes are
3 not cut off. They are active, so if you whisper to a
4 colleague, and if you rattle papers you are on mike, so just
5 be aware of that.

6 By the same token, when you take a witness down from the
7 stand, which I prefer not to do, but if you must, to explain
8 something to the jury, please make sure -- at that point you
9 are probably off mike. If you've got a witness you want to
10 take down from the stand please make sure they stand with
11 their back to the back wall so that they are facing our Court
12 Reporter and they can pick up -- the Court Reporter can pick
13 up whatever is being said, and also make sure whenever you put
14 a witness on the stand that you do a little bit of a mike
15 check and make that witness comfortable so that either they
16 are not roaring at us by being up close, or sitting way back
17 and being hard to hear.

18 Honestly, I don't like to engage with the witnesses to
19 tell them to speak up. I feel like I'm getting into issues of
20 credibility and believability when I do that. I look to the
21 lawyers to get the witness volume where it ought to be, and I
22 only engage in case I believe that somehow it's hurting the
23 proceeding or preventing others from being aware of what's
24 happening in here. So, please, be cognizant of that. Don't
25 look to me to fix that because, again, when I engage in that I

1 feel like I'm either helping or hurting one side or another.
2 I try to be cognizant of that.

3 This is a small thing that comes from my -- well, it's
4 not small, but it comes from my school teacher mother, no
5 chewing gum in the courtroom. If you are beyond the bar do
6 not come in chewing gum. That's a professionalism issue with
7 the jury. I just will say that to you in advance.

8 Exhibits. If you've got exhibits I'm hoping by now
9 you've had your exhibit conference, that you got exhibits
10 marked. Let me stop right there.

11 Do you have any exhibits marked to your knowledge?

12 **COURT REPORTER:** No sir. We haven't marked any.

13 **THE COURT:** Okay. The way I treat exhibits is, if they
14 are in evidence and agreed to then you can use them in
15 opening. Of course opening is not some long blown, you know,
16 persuasive argument, but if you've got an exhibit you want to
17 use, and there is no objection, and we know it's going to be
18 evidence, then you can use it, otherwise you cannot use it in
19 the opening. So I would encourage you all to be here early in
20 the morning to meet with our Court Reporter, Dixie, to mark
21 what exhibits you have, having already agreed on what you can
22 agree to, and we can go forward in that fashion.

23 I do not want to -- us to get in a situation -- and I'll
24 speak to the Plaintiff now because the Plaintiff goes first --
25 to have to stop, mark, lay a foundation and introduce things

1 that could readily have been agreed to and save us, you know,
2 three or four minutes per document because the jury gets
3 terribly bored while that is going on.

4 Just one moment.

5 And again, to the Plaintiffs, if you would, over the
6 evening hour pre-mark your exhibits, or at least have them
7 ready to be marked first thing in the morning, and get
8 agreements from Counsel as to what is, you know, clearly going
9 to be admissible. That would make our trial go much easier.

10 I have under advisement now, to come back in the morning
11 and tell you, the decision on the exclusion or non-exclusion
12 of the remarriage issue, as well as the alleged affair issue.

13 Now, any questions or anything between us before we go
14 into the trial?

15 **MR. TODD:** Just one thing. When a witness is on the
16 stand, if we go to lunch or break for the night ---

17 **THE COURT:** Right.

18 **MR. TODD:** ---Is the rule that there is no
19 communication about his testimony?

20 **THE COURT:** It is. It is. And I will tell the witness
21 that when we break.

22 And every day when we start this trial I'm going to ask
23 the jury if they've had a discussion about the facts of this
24 case with anyone, or been contacted by anyone. Of course I
25 don't expect that's going to happen, but I will -- I always do

1 that to remind the jury not to be talking about the case, and
2 I'll tell a witness every time we break not to discuss, not to
3 be talking to the attorneys because they are a witness under
4 testimony.

5 Any other questions or comments?

6 **MS. SCALISE:** Your Honor, will you also instruct them
7 not to do any internet research, or look up things on the
8 computer or that sort of thing?

9 **THE COURT:** Right. And I did that this morning, and I
10 will do that again, just to make sure that that doesn't
11 happen.

12 Anything else from any attorneys?

13 **MR. FOSTER:** Just one thing, Your Honor.

14 **THE COURT:** Yes sir, Mr. Foster.

15 **MR. FOSTER:** And Your Honor, I am the first one to
16 recognize scheduling problems, and getting witnesses up ---

17 ---But now when is it our experts start? Thursday. And
18 you want to put the family up on Thursday.

19 **MR. AIKEN:** Thursday, I think, is the only day that all
20 three family members will be here and can offer testimony, the
21 only day.

22 **MR. FOSTER:** And Judge, here's my problem. Okay. He's
23 talking about family members that the only really relevant
24 thing they've got to talk about is a five minute phone
25 conversation, and otherwise, you know, the testimony is

1 favorable to me, versus an expert that can be here only that
2 day, that I'm paying Five, Ten Thousand Dollars a day that we
3 have plane reservations for and everything else. I mean, I
4 understand their problem, and I certainly have done it
5 hundreds of times -- well, maybe not hundreds, but a lot of
6 times, you know, agree to take somebody out of order, but I
7 cannot agree to take a family member out of order that's here
8 for free, versus me having to pay -- costing me Five or Ten
9 Thousand Dollars a day.

10 MR. AIKEN: They are going to be extremely brief. If
11 Mr. Foster wants to have a brief cross that -- we can get them
12 up and down in a hour, all three.

13 THE COURT: All right. Let's do this. We may try to
14 trim the lunch hour, or work a little late or something.

15 And let me also say to you, there's going to be at least
16 one, maybe two mornings where I have things I have to take
17 before we start this trial. I may not be able to start until
18 ten on a couple of days, and again, these things are set
19 months in advance and I can never know where I'm going to
20 hit -- where it's going to fall when I'm hitting a target to
21 schedule these things so far out, but I know we have one
22 that's Wednesday morning. I think we have one this Thursday
23 morning as well.

24 All right. We will try to work that out.

25 MR. AIKEN: Thank you, Your Honor.

1 **THE COURT:** We'll try to work it out. Anything else
2 that we need to discuss among ourselves?

3 **MR. FOSTER:** You are not going to get mad at me if my
4 cross of Dr. Albala is long, are you, Judge?

5 **THE COURT:** No sir. I'm not going to get -- at some
6 point the -- Dr. Albala's ticker probably turns over. It
7 would be your responsibility as -- for his expert fees, but
8 I'll let y'all decide that among yourselves.

9 All right, folks, I -- again, I said this earlier. At
10 this level of court that we are doing one of my privileges is
11 to work with excellent lawyers, and I see by the parties who
12 are here we have professionalism, we have excellent parties,
13 we have excellent lawyers. I look forward to working with
14 you. Let's try to keep our wits and our civility about us
15 throughout this trial, and we will stand in adjournment now
16 until 9:30 tomorrow morning.

17 **(THE FOLLOWING TAKES PLACE ON THE NEXT DAY, MAY 18,**
18 **2010, OUTSIDE THE PRESENCE OF THE JURY.)**

19 **THE COURT:** All right, ladies and gentlemen, welcome to
20 the courtroom. Good morning. I'm Judge Baxley, for those of
21 you who may not have been here yesterday, and look forward to
22 working with you today.

23 Let me begin by saying, we have a juror, a young male
24 juror, unfortunately back in the back who is in tears this
25 morning over the fact that he just cannot sustain a two week

1 trial. His is Gregory Graff. He is juror number 150. He
2 says he works at -- is it Sams -- what was the name -- Peaches
3 Corner, and he just simply cannot afford a two week trial.

4 Now, we can address this in several ways. Number one, I
5 can just send a message back and let him go, because he's
6 definitely an unhappy juror, or I can bring him in here and
7 question him further. If I let him go though I must exact in
8 advance an agreement from the parties to go to eleven jurors
9 if we lose down to eleven. That would be a unanimous verdict
10 with eleven. That would still leave me two alternates in the
11 event there's some illness that strikes a juror, or whatever
12 may happen, so first of all, what says the Plaintiff about
13 accepting a verdict of eleven jurors or more unanimous?

14 MR. FOSTER: We will, Your Honor.

15 THE COURT: All right. Very good. And let's ask each
16 of the three Defendants now. What say the Defendants?

17 MR. TODD: We will, Your Honor.

18 THE COURT: All right. As for all three? All right,
19 Mr. Aiken.

20 MR. AIKEN: Yes sir, we will.

21 THE COURT: And Ms. Williams?

22 MS. SCALISE: Yes, Your Honor.

23 THE COURT: All right. Rather than embarrass this
24 gentleman it would be my preference to just allow -- let me
25 just step back in the back and let him go, just so he will

1 have a comfort level, won't feel like he has failed us, and
2 yet relieve his stresses. I'm going to return him to the jury
3 pool, but just release him from this panel. All right.

4 Okay. Again, no objections?

5 MR. AIKEN: No objection.

6 THE COURT: Hearing none.

7 I'll do that. Okay. Y'all excuse us. Just be at ease.
8 I'll be right back.

9 (THE FOLLOWING TAKES PLACE AFTER A SHORT BREAK AND
10 OUTSIDE THE PRESENCE OF THE JURY.)

11 THE COURT: All right. Mr. Graff has gratefully
12 departed the jury pool, and has now returned to the main jury
13 pool.

14 Now, is there anything before we bring in the jury this
15 morning? I

16 have a list of Joint Exhibits which have been given to
17 our Court Reporter.

18 Counsel, do you want to move those into evidence at this
19 time?

20 MS. SCALISE: Yes sir, Your Honor, we do.

21 MR. AIKEN: Yes, Your Honor.

22 THE COURT: Plaintiff, is there objection?

23 MR. FOSTER: Your Honor, the only objection would be
24 the Exhibit Number 6, depending on your ruling which we don't
25 have yet, the Cape Fear Behavioral Records. That's marital

1 counseling.

2 **THE COURT:** Oh, I see. There's an objection -- a Joint
3 Exhibit. All right. Well, let's just -- at this point we
4 will just leave it out. The decision is yet to come, so Joint
5 Exhibits 1 through 5, and 7 through 9 are in evidence, and
6 then Defendant's Exhibits 1 through 10 are in evidence. Am I
7 correct on that? Mr. Foster?

8 **MR. FOSTER:** Yes sir, with the exception of Exhibit 10.
9 I think we have -- have we gone over that? We are okay with
10 that too.

11 **THE COURT:** All right. So the only one that's not in
12 evidence is Joint Exhibit 6, because we have further
13 discussion on that.

14 **MR. FOSTER:** Yes sir, and our -- if it please, Your
15 Honor, our -- it's still sort of a work in progress, our
16 excerpts from the blog, and we are going to have that done
17 very soon as far as what we -- but I don't intend to talk
18 about it during opening anyway, so ---

19 **THE COURT:** All right. Well, I'm just trying to get
20 the exhibits in order. So 1 through 9, Joint Exhibits, except
21 6, are in evidence at this time, and Defendant's Exhibits 1
22 through 10 in evidence at this time.

23 Correct, everyone?

24 **MS. SCALISE:** That's correct, Your Honor.

25 **MR. TODD:** Correct.

1 (JOINT EXHIBITS 1 THROUGH 5 AND JOINT EXHIBITS 7 THROUGH
2 9 ARE ADMITTED INTO EVIDENCE AT THIS TIME. SEE INDEX FOR
3 COMPLETE DESCRIPTION.)

4 (DEFENDANT EXHIBITS 1 THROUGH 10 ADMITTED INTO EVIDENCE
5 AT THIS TIME. SEE INDEX FOR COMPLETE DESCRIPTION.)

6 THE COURT: All right. Then let the record so reflect.
7 Anything further before we bring in the jury?

8 MR. FOSTER: Yes, Your Honor.

9 MR. TODD: We ---

10 THE COURT: Well, let's go with the Plaintiff first.
11 Go ahead.

12 MR. FOSTER: Your Honor, well, I wanted to clarify one
13 ruling you made, Judge, and then ask you to do one other thing
14 for us, if you would.

15 As far as what -- I think your ruling was pretty clear
16 about what the family was going to be able to say or not say,
17 but the ---

18 THE COURT: Let me just break in, Mr. Foster. I made a
19 mistake then. I should have been out here earlier, because I
20 intended to start with the jury this morning at 9:30. Is this
21 something we need to do before opening?

22 MR. FOSTER: I think so, Your Honor. It's just real
23 quick, it's just clarification of your ruling is all it is.

24 THE COURT: All right. Please proceed quickly.

25 MR. FOSTER: In addition to what we talked about

1 yesterday, they were saying that -- they are going to say they
2 think Sean should have done this, they think Sean should have
3 done that. We think that's a lay opinion. It's not
4 admissible as a lay opinion. That's what the jury is here
5 for, is to decide what Sean should or should not have done.
6 It's not the subject of opinion testimony for a layman to say
7 what another layman should or should not have done in a
8 medical situation when they weren't even there.

9 THE COURT: All right. From the Defendants? Have we
10 resolved this issue or -- I'm not certain what Mr. Foster is
11 telling me, but is there a problem with whether or not you all
12 intend to follow the Court's ruling from yesterday?

13 MR. TODD: We intend to follow the Court's ruling.

14 MR. AIKEN: I understand the Court's ---

15 THE COURT: Okay. Mr. Foster, I can't -- I'm not sure
16 exactly what you are telling me, but I -- I don't see a
17 problem. Please object contemporaneously if it occurs.

18 MR. FOSTER: Yes sir. And the other thing I would ask,
19 Your Honor, is that we sequester -- we would request that the
20 Court sequester the lay witnesses, because there are so many
21 issues of disputed fact in this case that we think that the
22 witnesses should be sequestered so that they are not listening
23 to each other's testimony in regard to these disputed factual
24 issues.

25 THE COURT: Any reason other than the -- that you

1 prefer for one not to hear the testimony of the other?

2 **MR. FOSTER:** Well, no sir, not other than that reason,
3 other than they can build off of each other, so that's ---

4 **THE COURT:** All right. Very good.

5 **MR. AIKEN:** Well, I'm not sure what he's asking. Now
6 this family drove all night to be here, and they want to be
7 here for opening, and they want to be here for Mr. Fay. If
8 that's okay, then we don't have any problem.

9 **THE COURT:** I'm going to respectfully decline the
10 request, simply because it's my understanding of the rules
11 that for one to hear the other's testimony is not a
12 dispositive basis to sequester the witnesses. If there was
13 some other reason then the Court would consider it further,
14 but I'm going to decline to do that.

15 Motion denied.

16 Anything further before we bring in the jury?

17 **MR. FOSTER:** Well, Your Honor, can I just say this.
18 The only other reason is that, even without testifying -- even
19 without the testimony it's patently obvious as you ruled that
20 they couldn't -- they couldn't -- they couldn't get into this,
21 we don't support this, we don't support that, but with them
22 sitting in the courtroom right there, behind defense Counsel,
23 it's going to be patently obvious for the jury.

24 **THE COURT:** Well, Counsel, you know, I don't know what
25 brings us to this point in life, and the dynamics within that

1 family, and I don't know why people choose to sit on one side
2 or the other, you know, and whether or not the jury will take
3 an inference from that, it's certainly not testimonial, but I
4 don't find it to be -- as I weigh one against the other, this
5 is a public forum, these individuals have come some distance.
6 They obviously are persons of interest to this case, and I
7 just simply decline to exclude them.

8 MR. FOSTER: I understand. Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. TODD: One thing, and this -- I just want to bring
11 it up now, if we can get a -- some information on it this
12 morning. We've got an expert whose got problems next week.
13 We had planned to -- hoped to call him out of order Thursday.
14 Sounds like the Plaintiffs are going to take all day Thursday
15 with their experts. We would like to call this witness, Dr.
16 Proia, out of order tomorrow afternoon.

17 THE COURT: All right. We'll take that up probably at
18 the morning break, or the lunch break. We'll discuss that
19 among ourselves.

20 And also, I'm prepared to make certain rulings on some
21 of the issues under advisement, but I don't think they are
22 necessary before opening, and thus I will do that at a later
23 time this morning as well.

24 Ms. Smith, you are going to swear the jury when they
25 come in?

1 MS. SMITH, DEPUTY CLERK OF COURT: Yes, Your Honor.

2 THE COURT: Okay. Very good. Everyone ready?

3 MR. FOSTER: Yes sir.

4 THE COURT: All right. Please bring in the jury.

5 Counsel, I'm going to ask you not to refer to where
6 people are seated in the courtroom, and who supports. I know
7 that's obvious, but just please don't do that in the opening.

8 MR. AIKEN: I thought I might introduce them.

9 THE COURT: I don't have any objection to that.

10 MR. AIKEN: Thank you.

11 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
12 JURY.)

13 THE COURT: All right, ladies and gentlemen, welcome
14 back to the courtroom. I trust you had a nice evening, and we
15 are going to begin this trial with you accepting the oath as
16 jurors in this specific case.

17 Please follow Ms. Smith's instructions..

18 (AT THIS TIME THE JURY WAS SWORN.)

19 THE COURT: And let me ask, ladies and gentlemen, is
20 there any juror that did not take the oath just administered.
21 If you did not take the oath please raise your hand, for
22 whatever reason.

23 Let's let the record reflect no one has raised their
24 hand and all of our jurors are appropriately sworn.

25 All right. Then before we get started let's kind of

1 catch our breaths for a moment and see where we find
2 ourselves.

3 Let me, first of all, tell you that one of your
4 colleagues, Mr. Gregory Graff -- and you may be aware of
5 this -- he, because of some family and financial pressures,
6 has asked to be relieved as a juror. I have released him as a
7 juror. It's nothing he did wrong. It's just simply a set of
8 circumstances that caused the Court to release him.

9 And I want to say to you, I try to treat everybody
10 equally. You all are giving your time. Mr. Graff, after
11 further reflection, didn't feel that it was -- he was in a
12 position where he could do that, and I just felt, rather than
13 have a juror who may be unwilling or uncomfortable, the best
14 thing to do was to release Mr. Graff. I wanted you to be
15 aware of that.

16 Secondly, let's just begin -- let's just take a moment
17 and let me introduce to you the people who will be working
18 around you for the next few days who work for the Court.

19 I'm going to let the lawyers, if they wish to, in their
20 opening statements -- and they'll talk to you in a little
21 while in opening -- if they wish to introduce themselves, or
22 introduce their parties or witnesses they are welcome to do
23 that, but let's just talk about who the Court personnel are.
24 I don't tell you this so you will remember everybody's names,
25 just so you will know what the various people around you are

1 doing, and what their role and function is within the
2 courtroom. Again, my name is Judge Baxley, I'm from
3 Darlington County, working here almost continuously though in
4 Horry County, and I'll be the presiding officer during the
5 trial.

6 Now this is a court of record, meaning what's said here
7 is taken down, and Dixie is our Court Reporter, who is seated
8 right here on my right. You will, of course, be working
9 closely with her during this trial. Ms. Gloria Bell is our
10 jury bailiff. She's been working with you as you come and go
11 from the courtroom, and whatever needs you may have Ms. Bell
12 is here to assist you. Sandra Smith is our Clerk's
13 representative. She works for Melanie Huggins, who is our
14 elected Clerk of Court, and she will be here administering and
15 swearing oaths here during the courtroom. Raymond Nobles, in
16 the back, is our court security officer from the Sheriff's
17 Department. And then seated beside me today is William
18 Tinkler, who is a new lawyer who is working this week, or
19 today, as my law clerk. Again, this is just so you will know
20 who those individuals are that you see coming and going that
21 are employed with the Court during the course of this trial.

22 Now let me ask, since we were last together, is there
23 any member of this jury panel who has had a discussion about
24 the facts of this case with anyone, or who has been contacted
25 by anyone about this case? If that applies to you please

1 raise your hand.

2 Let's let the record reflect, Madame Court Reporter,
3 that no one has raised their hand, and I didn't think anyone
4 would be contacting you, but I would certainly want to know
5 that if they did, and I appreciate you complying with the
6 Court's request to not discuss the facts of the case with
7 anyone.

8 Now, we have put in your care there, a note pad and a
9 pen, and you are not required to take notes, and some people
10 prefer to listen, and some people, whenever they feel like
11 they need to retain something, prefer to write it down. I'm
12 going to let you make that choice yourself, but we give you
13 the opportunity.

14 A couple of things about your notes. We treat your
15 notes confidentially and secretly, so I would suggest on the
16 first page, only, you write your name, so that tomorrow
17 morning when these books are handed back to you you can
18 immediately identify whose is whose. I will tell you that we
19 take up the notes at the end of every day. We do this to
20 preserve confidentiality purposes, and then we give them back
21 to you the next morning. We do not review the notes. I will
22 tell you again, no one will look at your notes. No one will
23 turn beyond that first page in your notebook. That's why if
24 only your name is on the first page nobody will be looking in
25 any notes, even by accident, and at the end of the trial we

1 will destroy your notes, and we do that for this reason. The
2 jury deliberations, and the thoughts of jurors are absolutely
3 confidential.. That's a sacrosanct protection within our
4 system, and we will not allow it to be violated, so please
5 understand we will be destroying your notes, again, without
6 reading them, without reviewing them, at the end of this
7 trial.

8 Now, one final point about notes, is if you choose to
9 take them the best way to use your notes -- and the only
10 appropriate way in deliberation is just to refresh -- refresh
11 your own recollection as opposed to proving a point, someone
12 says, well, it's got to be this way because here it is in my
13 notes. Just use them for your own recollection and
14 refreshment of that recollection would be the appropriate use,
15 if you choose to take notes.

16 Now, I'm going to talk with you here in the beginning of
17 this trial about what I call the introduction to a civil case.
18 These are just a few thoughts that I think you need to know
19 going in. This is not intended to supplant or take the place
20 of a much more detailed charge on the law, and I'll give you
21 at the end of the case, in fact, the last person you will
22 probably hear from before you retire to deliberate will be the
23 Court giving a detailed charge on the jury. Now -- or to the
24 jury on the law.

25 Now let me ask you, can you hear me, ladies and

1 gentlemen? Are you able to hear me in the courtroom? All
2 right. Well, throughout these proceedings if, for some
3 reason, you can't hear, if you will signal the lawyers by
4 putting your hand behind your ear, I'm sure they will
5 understand that and be responsive to you.

6 Now, as I said yesterday, we are in civil court here.
7 This is not criminal court. No one is going to jail as a
8 result of what the allegations are, or whatever happens in
9 this courtroom. This is a civil case where there is a dispute
10 between the Plaintiff and three Defendant entities or
11 individuals. They cannot resolve these among themselves and
12 thus a jury is empaneled to make the decision in the case.

13 Now, the Plaintiff is at the table seated close to you.
14 The Plaintiff's side of the case is seated at the table
15 closest to you, and I will tell you that one of the traditions
16 in our courtroom is that the party with the burden of proof
17 sits closest to the jury, and thus you can infer from that the
18 Plaintiff has the burden of proof in that case, and that
19 burden is by the greater weight or the preponderance of the
20 evidence. I will discuss that with you more fully at the end
21 of the case, but what that basically means is, the Plaintiff
22 has the burden of proving each of the essential elements of
23 the causes of action that the Plaintiff alleges in their
24 Complaint.

25 Now the purpose of this trial is to determine whether or

1 not the Plaintiff is entitled to the relief that they claim,
2 or that they seek, because again, the Plaintiffs have made
3 these claims and the Defendants have denied these allegations.

4 Now, let's talk about what your role is in this case,
5 and what my role is. I'm the judge of the Law, meaning that I
6 make the decisions if there are disputes about the rules, or
7 following the rules, or some legal issue, but you are the
8 judges of the facts. No one else in the courtroom are the
9 judges of the facts other than you collectively, and what that
10 really means is, is that you will listen to the testimony, you
11 will determine from that testimony what the facts are, you
12 will then apply those facts to the Law that I give you, and
13 that's how, working together, we will reach a verdict in this
14 case. In a simple nutshell that's how this process works.

15 Now let me just say to you in advance -- and I tell you
16 this in advance because you may want to consider this while
17 the witnesses are testifying. One of the things you are
18 going to have to do as the judges of the facts, is to
19 determine the credibility and believability of the witnesses,
20 because, and I will tell you, just like you, I have not heard
21 the evidence in this case, but I know from experience that
22 often we will have witnesses that will come in and testify,
23 whether they be expert witnesses or lay witnesses, to things
24 that sometimes seem inconsistent, and sometimes absolutely
25 mutually exclusive and cannot be reconciled. I'm not telling

1 you that someone is going to be dishonest with you. This is
2 for you to decide. But I think we all know, from human
3 experience, that people will observe an event, and then the
4 descriptions you will hear of that event are so varied that
5 you wonder is it the same event that everyone is talking
6 about.

7 So now, I will tell you also -- Mr. Nobles, I'm going to
8 ask you if you would secure that back door, please.

9 All right. Thank you.

10 I'm going to ask you -- I will tell you also that, in
11 determining credibility and believability, if you think about
12 it it's something that we do every day. We do it for
13 everybody we talk with, whether it's a child, or another
14 adult, a friend or a stranger, and you should use those
15 criteria that you use in everyday life to determine
16 credibility and believability if you hear testimony that seems
17 absolutely mutually inconsistent. Some of the things you may
18 want to look to though here in the courtroom is what is the
19 demeanor of a witness while they are testifying, are they
20 hesitant, are they straight-forward, how does that witness
21 come to know what it is they are in here testifying about,
22 what's their ability to know what they are talking about, is
23 the witness's testimony consistent with itself, and is it
24 weakened or strengthened by other evidence in the case, and
25 finally, or further, in light of the global evidence in this

1 case, as you determine it to be, how reasonable is what that
2 witness is saying. And then finally, lastly, might there be a
3 reason a witness would want to help or hurt one side or
4 another of the case, might that witness have a bias or a
5 prejudice. Again, these are things I tell you that you may
6 wish -- or should consider as the witnesses are testifying.

7 Now, let me tell you a little bit about how we are going
8 to proceed in this trial. I'm going to be finished here in
9 just a moment or two, and when I do the lawyers are going to
10 come before you in opening statement. Opening statement is
11 not some big persuasive event like you may see on television.
12 There are very few things in your life that work like they do
13 on T.V.. Their opening statement is an opportunity for the
14 lawyers to come before you and tell you what they believe the
15 evidence will or will not show in the trial of this case, and
16 after we finish opening statements from the Plaintiff and each
17 of the Defendants, and the way we are going to proceed is,
18 when we get those -- we have three Defendants, as you heard
19 yesterday, by the way they are named in the pleadings, one,
20 two, three, we are going to go in that order throughout this
21 trial, whether we are doing opening statements, the closing
22 statements, or whether we are doing cross-examination of
23 witnesses.

24 Now after we finish opening statements the Plaintiffs
25 will begin to call -- they put their case up first. They will

1 call their witnesses one after another, and every time they do
2 that witness will be subject to direct-examination by
3 Plaintiff's Counsel, and then cross-examination by each of the
4 Defendants' Counsel. I tell you that because we have
5 different rules for the way direct and cross-examinations
6 work. And then after the Plaintiff finishes all their
7 witnesses then we move into the Defendants' cases, one after
8 another, by the order of the pleadings, and they call their
9 witnesses, and every time they do that witness is subject to
10 direct-examination by the Defendant's Counsel who called the
11 witness, cross-examination by the other attorneys, including
12 Plaintiff's Counsel, then the testimony closes, the lawyers
13 come before you in closing statement, which is a persuasive
14 event, where the lawyers can tell you what they believe the
15 evidence has or has not shown, and their reasons for which
16 they believe that, and then I give you the charge on the Law,
17 and you retire to deliberate. That's a very simple explanation
18 of how this process works, but that is, again, how we will go
19 forward.

20 Now, let's talk about a few more things before I close,
21 and first of all, let's talk about your personal comfort
22 level. Yesterday we had you freezing in here, today you might
23 have worn some heavier clothes, and it's a little bit warmer
24 in the courtroom, so let us know what your comfort level is
25 about cool and heat. We try to respond to that as best we

1 can, given the fact this is a large building with a systemic
2 energy saving heating and cooling system.

3 Secondly, I want to tell you that I usually go about an
4 hour and a half before I take a break. I don't want you
5 watching the clock on the wall. In fact, if you will look
6 the clock is actually put behind you on the wall, so it's kind
7 of hard for you to watch that clock back there, but if you
8 need to take a break before we reach the time that we take a
9 break -- and I can never break to the minute -- depends on
10 where we are in testimony, and what we are doing -- please,
11 raise your hand, I'll understand what that means, we will stop
12 directly and immediately and take a break. I do that for two
13 reasons, number one, you are giving your time, almost giving
14 it, for an extremely important judicial function and high
15 civic duty. I want you to be comfortable about what you are
16 doing. But secondly, I don't want you worried about something
17 else. I want you to be able to listen to the testimony and
18 the evidence in the case and make a decision based on the
19 facts without having to be worried about something else while
20 the trial is going on.

21 Now, when we do take a break, please, don't go back in
22 the jury room and discuss the case. It would be inappropriate
23 to do that, because first of all, the Plaintiff starts out
24 with their case, and the Defendants come later. If we took
25 one witness, or half a witness, and went back and the jury

1 made some preliminary decision that drove the rest of the case
2 without hearing the rest of the evidence that would be very
3 unfair to the parties, so please don't discuss the case until
4 it's given to you for deliberation, and then and only then is
5 it appropriate at the end of the case.

6 Now I also want to tell you, we operate on a system of
7 rules here in the courtroom that we call the Rules of
8 Evidence, or the Rules of Civil Procedure, and when one side
9 or the other thinks that the other side is either breaking
10 those rules or just about to break them well they call that to
11 my attention by an objection. Well, just like you are sitting
12 over there where you are and I'm sitting here, I don't know
13 what the objections are before they come, but when they do
14 come I rule on them, usually right here in your presence, on
15 the basis of my understanding of South Carolina Law, both
16 substantive Law and procedural Law, my experience as a lawyer
17 for many years before I became a Judge, and my experiences as
18 a Judge over ten years on the bench, as well as my training as
19 a Judge when I first took this job, but never do I somehow
20 rule on an objection to try to send you a message about how I
21 feel about an issue or the facts. Please understand, I don't
22 have a position on the facts, because if I did I would be
23 invading your province. You are the judge of the facts, not
24 me. So I'll tell you that to say, please, take no inference
25 from any rulings you may see me make here during the course of

1 this trial.

2 Also, and finally I want to tell you that, when the
3 lawyers come before you and speak to you, as they are getting
4 ready to do in opening statement, and then in closing, I want
5 you to understand that what a lawyer tells you is not
6 evidence. If you think about it, the lawyers are not under
7 oath here. They are not being subject to direct and cross-
8 examination as the witnesses that are, and the exhibits that
9 go into evidence. That's the evidence in the case. Please
10 appreciate the distinction between a lawyer's argument and the
11 evidence in the case. Obviously you determine what the
12 evidence is based on what the witnesses testify to. I'm not
13 saying the lawyers are going to be dishonest with you. I
14 simply say, they are advocates so please be aware that what
15 they say is not evidence in the case.

16 Just one moment, ladies and gentlemen.

17 All right. That concludes the comments from the Court.
18 I want to tell you again, I look forward to working with you.
19 Thank you again for your service as jurors and this very
20 important civic role.

21 The Court now recognizes Plaintiff's Counsel for opening
22 statement.

23 **MR. FOSTER:** Thank you, Your Honor. May it please the
24 Court.

25 **THE COURT:** Mr. Foster, yes sir.

1 **MR. FOSTER:** Ladies and gentlemen of the jury, good
2 morning, and I understand that we were introduced briefly by
3 the Court, and the parties when y'all were in here and we were
4 asking you -- and the Judge was asking you all those
5 questions, but I know you've heard a lot of names at that
6 time, and I know when I get introduced to a group of people
7 I'm lucky if I remember one of them, of their names, so I'm
8 going to introduce myself again and tell you, my name is Russ
9 Foster, and I represent Kelly and Sean Fay. Sean is seated
10 right here in the blue suit, in the middle of the table,
11 again, this is Sean Fay. And again, Mr. Hewitt, sitting
12 beside him, that works with me, and Ms. Corbett, again, my
13 paralegal, who is seated behind them.

14 I know that Judge Baxley thanked you when you came in
15 here, and told you what a patriotic duty it is to serve on
16 jury service, because we know nobody really volunteers for
17 this duty. It's not something that people cherish or look
18 forward to doing, but I wanted to let you know that -- and I'm
19 not going to bore you with how much we do, but we do
20 appreciate you being here and not making up lame excuses to
21 get out of jury services. I'm not saying anybody has done
22 that, but it does happen from time to time, and we do
23 appreciate you being willing to sit here and resolve this
24 dispute.

25 Believe it or not, as much as you would like to be doing

1 something else maybe this week -- and most times I would agree
2 with you, however, I'm happy to be here this week. We have
3 been waiting -- Sean -- I have not been waiting, but Sean Fay
4 has been waiting eight years, eight years to get a panel like
5 yourselves to hear this case, to hear him stand up for his
6 wife, who cannot stand up for herself, and he is certainly
7 most grateful for you being here to hear the evidence in this
8 case, and to resolve this dispute between the parties once and
9 for all, and that's -- you can't even begin to understand how
10 much this means to be able to finally get in here and resolve
11 this case.

12 Now, I've introduced Sean to you. He's sitting right
13 here. He's been waiting. I can't introduce Kelly to you
14 because, as you already know, she is not here. We did bring a
15 picture of Kelly. I would like to show you the picture of
16 Kelly so at least you know what -- who we are talking about
17 when we are talking about Kelly Fay, and you don't have to
18 imagine in your minds who Kelly Fay is, or what she looks
19 like, or anything of that nature, so this is Kelly and this is
20 Sean. I'm going to lay that down.

21 Now, I'm going to tell you the truth, as best I can
22 here. I stayed up probably half the night trying to think of
23 something really clever to say to you in opening statements
24 that would just prove that what we are saying is the truth,
25 and common sense, and medicine and everything else, and as you

1 -- I couldn't. I can't think of anything really clever to say
2 that's going to commit you in opening, and hopefully you are
3 not going to be convinced in an opening by me, or by any of
4 them, because you haven't heard the evidence yet. What I'm
5 saying to you now is not evidence. What I'm trying to tell
6 you now is what we are going to show you, what we are going to
7 prove to you during the course of this trial, with records,
8 with testimony, with expert doctors that come in here and tell
9 you their opinions.

10 Let me tell you a little bit about that. The reason
11 that we have to have expert doctors come in here and give you
12 their opinions, even though they weren't there at the time,
13 they didn't have anything to do with the treatment, but they
14 read the records and they come in here and give you their
15 opinion is because the law says we have to. If we don't -- if
16 we can't prove our case through expert doctors then we are out
17 of court, because -- and here's the reason why. Because if
18 you are not a doctor then you really can't form an opinion to
19 put off, through that stand, about what was done, what should
20 have been done, and what wasn't done in Kelly's case. Okay.
21 You have -- I mean, you have to have that expert knowledge to
22 be able to do that. So we will bring our expert witnesses in
23 here for you to hear what they have to say, and their opinions
24 about what happened, but I'll talk about that a little bit
25 more later.

1 I know you are going to want to know a little bit about
2 Sean because he's going to be the one here talking today.
3 I'll introduce him to you, but basically Sean and Kelly both
4 had very average -- very average American families, grew up up
5 North in Milwaukee and Illinois, and that sort of thing, and
6 I'm not going to begin anything by once upon a time like a
7 fairy tale, but at some point you will hear from Sean that
8 their paths crossed, they fell in love, Kelly was still in
9 high school. Sean was just out of high -- not too far out of
10 high school, and they got married. As soon as Kelly graduated
11 high school, shortly thereafter, they got married and shortly
12 thereafter moved to North Carolina. They moved to North
13 Carolina because Sean, if I'm not mistaken, was still involved
14 in the military. He was in the Army and had been in Germany,
15 and had come back, and still involved in the military up at
16 Fort Bragg in Fayetteville. I think we probably all know
17 about Fort Bragg in Fayetteville. And they stayed there for a
18 while and worked there for a while. Sean was basically a
19 computer guy. He also worked parttime as a security guard for
20 a college, I believe, and was sort of interested in security
21 guard, law enforcement, that type of thing, and then in career
22 moves and because they wanted to, they came to beautiful Horry
23 County, to Myrtle Beach. I don't think anybody would argue
24 with me about Myrtle Beach being a nice place to come visit,
25 being a nice place to live, as I could tell by my open door

1 and listening to the ocean last night. It's very peaceful.

2 However, I wish I had some happy stories to tell you in
3 this case, but it's not a happy case. This is a very sad
4 case, and you will hear that through -- you will see that
5 through the evidence, and I'm sure you have already surmised
6 that based on the facts that you have heard already.

7 At any rate, they moved down to Myrtle Beach and
8 everything was going great, everybody was moving along in
9 their careers. You will hear testimony in this case from
10 Kelly's boss, who she was working for, that she was nothing
11 but a rising star, that she was an absolute gem, the best
12 employee he has ever had in his entire life, and you will
13 hear, through Mr. Lindsey, you will hear what he expected her
14 career -- what she was making at the time, what her career
15 track was going to be, and what he expected to do with her,
16 and how she was loved.

17 There won't be a witness in this case, ladies and
18 gentlemen, that will take that witness stand and tell you
19 anything different about Kelly Fay but that everybody that
20 knew her, everybody that knew her, everybody that loved her,
21 everybody that met her, in a sense, loved her, and I don't
22 mean like her family, but you know where I'm coming from when
23 I say loved her. She walked in a room, we will show you, she
24 had a smile that lit up the whole room. People young, old, in
25 between, they all loved her. Okay. You won't hear any

1 contrary evidence to that.

2 I don't think you are going to hear any contrary
3 evidence as to Sean's feelings for her. You will hear that
4 through inferential circumstantial evidence, direct evidence.
5 You will hear all that because it's testimony that you need to
6 hear to decide this case, and we'll get more into that later.

7 Now, as I said, everything was going great, everything
8 was going great down in Myrtle Beach. She was moving up.
9 Sean had a great job in computers, where they thought his life
10 was going to take him. This was in 2001, and then we lead
11 into 2002, and that's where this nightmare began.

12 Let me first of all back up just a second and tell you
13 that, while they were living in North Carolina, I think in the
14 year 2000, Kelly Fay had a kidney stone in North Carolina.
15 the Southeast -- you will hear evidence, ladies and gentlemen,
16 that the Southeast is the stone belt, a kidney stone is not an
17 unusual event down here, I mean, this is where most of the
18 kidney stones occur, is in the southeast portion of the United
19 States, and there are reasons for that, and some of the
20 experts may get into that. But she had a -- but when she
21 got -- she went to the hospital there, and they did lab tests,
22 and they tested her and they treated her, and basically came
23 to the conclusion -- I think the evidence is going to show
24 you, that she had already passed the stone when she got there,
25 and probably didn't even -- probably didn't even know it. It

1 was a much smaller stone than what we are going to be talking
2 about. It was in a different location. It was lower. You
3 will hear evidence about location and size of stones, and
4 whether they are expected to pass them on their own or not,
5 but at any rate, when she woke up January 26, 2002, here in
6 Myrtle Beach, she woke up at 7:30 and woke Sean up, and she
7 was in severe excruciating pain, and she knew that pain
8 because she had had that pain once before on a kidney stone,
9 and I think every expert that will take the stand will agree
10 with this. I don't know whether there will be any dispute
11 about this, that they say -- and I certainly can't tell you,
12 but they say that a kidney stone is probably the most
13 excruciating pain that you will ever have, and some people
14 even say more than childbirth, or equal to childbirth.
15 Certainly I'm not going to talk to you about that, because I
16 don't know anything about that either. Now, the experts may
17 or may not.

18 As I said, this is when the nightmare began. They woke
19 up, but I've spent a lot -- they woke up, she was in
20 excruciating pain. Obviously it was painful to see your wife
21 in pain. That doesn't mean that you have to panic or go crazy
22 because of pain, but at any rate that was at 7:30. Within
23 thirty minutes, within thirty minutes of her waking him up
24 Sean had her at South Strand Hospital, okay. So they are
25 there, the records will show you. We have the E.R. reports,

1 and they are already into evidence. I have some blow-ups of
2 these E.R. reports of the medical records from South Strand,
3 because there aren't very many of them, and there's going --
4 but believe it or not, in just a couple of pages of records
5 you are going to hear more factual disputes about what was
6 done and what was said than you would ever imagine possible.
7 I'm not going to put the blow-ups up now and try to go through
8 all the evidence, because that's what -- that's what the trial
9 is for. That's what we are going to do during the trial. We
10 are going to show it to you. But I am going to talk a little
11 bit to you about it. She came in, he had -- like I said, he
12 had her there by eight o'clock, according to the records, and
13 she came in and they were so un -- it was in January so it
14 wasn't really tourist season, but they had her back -- they
15 had her back in the Emergency Room within like three or four
16 minutes, like that. The triage nurse -- when I say triage
17 nurse, let me back up and tell you this too. You are going to
18 hear a lot of testimony in this case, ladies and gentlemen,
19 that are using Sixty-four Dollar words that you are not going
20 to understand, okay, and I'm not trying to tell you I
21 understand them either. I understand some of them, but I've
22 been working on this case for six years, okay. I've been
23 studying this case for six years. I've been asking doctors
24 that we took depositions of, what does that mean, so I know
25 some things about it, but I'll do my best to get, at least our

1 experts, to explain it to you in words that you will
2 understand, instead of using these words that are about this
3 long that nobody is going to have a clue what it means.

4 But at any rate she gets there and the triage nurse is
5 the nurse that you see when you first go into the hospital.
6 She's the one that takes your temperature and your blood
7 pressure, and asks you what's wrong, and then she has to
8 make -- she or he has to make a classification as to whether
9 you are not urgent, whether you are urgent, or whether you are
10 emergent, okay, and then based on that triage classification
11 determines how quickly you get seen. Anybody that's been to
12 the hospital knows that. Most people that have been to the
13 hospital think that the people there going ahead of them
14 shouldn't be because they need to be seen before them, but
15 there is a rhyme and a reason why they take people back the
16 way they do. There's a certain classification system that
17 forces them to do one thing or other. They have policies and
18 procedures, the hospital does, on who gets seen first and why.

19 She was classified as urgent when she got there.
20 That's, number one, because of the pain that she was in when
21 she got there, and in fact, I believe the triage nurse will
22 even testify to you that she met -- she -- they were so unbusy
23 she not only took her right back, but she met her at the door
24 and opened the door for her and let her in, she and Sean.

25 So they go in and she is -- her chief complaint, as you

1 will see from the medical record dictated by Dr. Law, her
2 chief complaint was abdominal pain and back pain. They
3 examined her, they took an x-ray of her, and he determined
4 that she had a kidney stone, and on the right -- in the right
5 ureter, near the ureteropelvic junction, and I won't try to
6 explain it to you now, but you will learn what the uretero-
7 pelvic junction is. Essentially what the testimony will show
8 is, when you have a kidney stone up in the kidney it may or
9 may not hurt, but when it starts -- what causes that pain is
10 when that kidney stone falls down into the ureter, which is
11 only probably two to three millimeters in diameter, and that
12 stone sticks in that ureter, that's when you start going into
13 pain.

14 So they diagnosed the stone on -- Kelly already thought
15 she had a stone. They diagnosed it on x-ray, and they took
16 what they call -- what they -- they are going to hear -- you
17 are going to hear them call a urinalysis, but really what they
18 took was a half a urinalysis. They took a dip-stick, okay. A
19 dip-stick is not a microscopic analysis of your ureter, it's -
20 - they dip a stick in it and see what colors it turns, and
21 then they try to determine certain things off the dip-stick,
22 like, you know, pH and specific gravity, and things about your
23 urine like that.

24 The testimony you are going to hear -- you are going to
25 hear two different sets of testimony, but I submit to you that

1 you will hear expert testimony that the doctor, Dr. Law, as
2 the E.R. doctor, had a duty to rule out infection in a patient
3 with a kidney stone.

4 And I'm going to tell you something now that you may or
5 may not know. I doubt most people know this, but there won't
6 be any -- there won't be much argument, certainly not between
7 Dr. Law or Dr. Young -- they both agree that a patient with a
8 kidney stone, if they have a fever, then that's a true, quote,
9 true urologic emergency. You don't pass go, you don't hang
10 around in the Emergency Room, they call in the urologist, they
11 take you back -- they call in the operating room crew, they
12 take you to the operating room, and unless they can attribute
13 that fever to something else, because it's indicative of an
14 infection, and they drain the urine that's backed up behind
15 that stone, if that stone is obstructing, okay, and they say
16 that is a true urologic emergency, kidney stone and a fever.
17 Okay.

18 Now, when they -- after they took the x-ray, after they
19 took the x-ray they took a CAT scan, CT, of her abdomen, and
20 they also took one of her pelvis, which didn't show anything
21 because she didn't have a stone down in the lower part of the
22 ureter before the bladder. She had one in the proximal part
23 of the ureter, which is up toward the kidney.

24 The CT report also said that that stone was moderately
25 to severely obstructive, obstructing her ureter, so that

1 urine, obviously, can't get by. Dr. Law's diagnosis was
2 severe hydroureter. Now what hydroureter means is sort of
3 what it sounds like, in Latin phrases, hydro being water, and
4 ureter being the ureter, meant that the urine was backed up
5 behind the stone up here, and everybody -- most experts will
6 tell you, that sit on this stand, that when you have static --
7 see, normally your urine is flushing down, so if there's any
8 bacteria in there it's getting flushed out.

9 Now, contrary to popular belief, urine does not -- urine
10 does not go down from the kidney to the bladder because of
11 gravity. The ureter, actually it's like your esophagus. It
12 has what they call peristalsis, and it works the urine down to
13 the bladder, okay, and then it goes from there. But not only
14 did she have an obstructing stone, it was obstructing to the
15 point to where it had already backed up and blown out of the
16 ureter, and was leaking out into her body cavity, and that was
17 on CT that was taken at 10:20 on that morning.

18 Now, you are going to hear conflicting evidence between
19 Dr. Law and Dr. Young, I believe. Now it may turn out to be
20 true, but certainly Dr. Law -- Dr. Young, the urologist that
21 was called on -- I'll get to that in a minute -- that was
22 called on this case, knew that there was obstruction, knew
23 that there was an extravasation of urine, okay, knew Dr. Law's
24 diagnosis of severe hydroureter, but even in the face, ladies
25 and gentlemen, of this -- these admissions that a kidney stone

1 and a fever is a true urologic emergency, nobody -- there were
2 three nurses in that operating room, there was one Emergency
3 Room doctor, even in the face of a kidney stone and a fever
4 being a true urologic emergency, nobody bothered to ever take
5 her temperature after eight o'clock that morning, and she was
6 there for four hours. She was there until noon. Nobody ever
7 took her temperature again. They don't -- they don't say they
8 did, and forgot to write it down. They admit they didn't do
9 it. They didn't do it. The only thing that was done on that
10 morning to rule out an infection in Kelly Fay was that dip-
11 stick urinalysis. That was it. You will hear expert
12 testimony coming from that stand, from our doctors, that that
13 is not good enough, that just doesn't cut it, not to mention
14 the fact of that ease with which some -- all somebody had to
15 do was put a thermometer in her mouth and take her
16 temperature, because our experts will also tell you that, in
17 their opinion, she had a temperature while she was in the
18 hospital, she had a fever before she left the hospital, and
19 they sent her home anyway, but they didn't know what her
20 temperature was, because they didn't check it, they didn't
21 bother to put a thermometer in her mouth before she walked out
22 of the door, even though two out of the three nurses
23 admitted -- have already admitted, and they will admit from
24 the stand, or you will hear us read, that they, as well as the
25 Doctor, knew that a kidney stone and a fever was an emergency.

1 The question then became, well then why didn't you take her
2 temperature. Didn't think we needed to. Didn't think we
3 needed to. And you know what, the evidence will show, most of
4 the time that would have been all right. They would have
5 gotten away with it. Okay. Most of the time you can have a
6 kidney stone, it's going to pass, nothing bad is going to
7 happen, but you can't -- I don't want to get into argument,
8 but let me just put it to you this way. You will hear from
9 the stand, you will hear from our experts what the standard of
10 care is to rule out infection, to make sure, to make
11 absolutely positive that you -- as positive as you can be,
12 that before you send somebody home with a kidney stone they
13 don't have a fever or an infection. A fever is only important
14 because it's a sign of infection, okay, and that's why you've
15 got to know. You can't send somebody home with a kidney stone
16 and infection. So you will hear that from the doctors.

17 Now let me tell you what you will hear from Dr. Law. I
18 don't know if you will hear it directly from Dr. Law, or
19 whether I'll have to make him read it out of his deposition,
20 but you will hear this, and I submit to you the people's
21 natural reaction is to tell the truth. I asked -- I have
22 asked previously Dr. Law -- and you will hear me ask him on
23 the stand -- what did you do to rule out infection in Kelly
24 Fay before you sent her home. His response would be -- and I
25 hope I'm right on this, if I'm not I'll correct myself during

1 the trial, or during closing, because that's the next time
2 I'll get to talk to you directly, okay. His response to me
3 was that he did a complete blood count, that he did a chem
4 panel, that he did a urinalysis, and that he did a KUB or a
5 CT, or both, which the KUB and the CT were certainly proper,
6 and it certainly would have been proper if he had taken a CVC
7 and a chem panel, and a fully microscopic urinalysis to look
8 for bacteria, but he didn't, and I said, Dr. Law, show me
9 where you did that, show me in the record where you ordered
10 those tests or took those tests, and then he said -- and I
11 also asked him, I said, is that pretty much standard protocol,
12 and he said yes. Then later on he goes, well, maybe not
13 standard protocol, because sometimes we take our individual
14 treatment for certain patients, and in her case that's what we
15 did. But then later on I said, well, please show me where
16 that was done, so I mean, if that was done show -- and he
17 goes, well, I guess we didn't, I guess we didn't.. Nobody
18 checked, nobody saw, he didn't order it, the nurses didn't
19 bring it to his attention, so it wasn't done.

20 Now, the nurses, why have we got the nurses in this
21 lawsuit and the hospital is as their employer, because the
22 nurses, as I told you, both, two of them, two out of three of
23 them knew kidney stone and a fever is an emergency, and all
24 you are going to see on their nurses notes, there will be a
25 column -- when we show you the medical records there will be a

1 long column for temperature. It's completely blank, just
2 wasn't done, just wasn't done.

3 So after all this occurs, and she's still in the
4 hospital, of course they give her pain medication, they give
5 her Toradol, and that didn't work, to take care of her pain,
6 so then she was given -- according to the nurse who gave it to
7 her, two milligrams of Dilaudid, but that did the trick.
8 Anybody that's ever had Dilaudid knows how strong Dilaudid is.
9 It's a synthetic morphine. I think the experts will admit
10 that took care of the pain, but that's really all that was
11 done. There was never anything done to treat the kidney
12 stone, or anything like that, to get rid of it, or to drain
13 urin -- or anything, but that's more for the development of
14 testimony.

15 But what the evidence will show you is that, after Dr.
16 Law had done these things he then calls in a consult with Dr.
17 Young, the urologist, the kidney expert. He specializes in
18 Urology, so he calls him, and it's in his typewritten E.R.
19 report, which we are going to show you throughout the course
20 of this trial, there are some real inconsistencies in this
21 typewritten E.R. report compared to what was written down in
22 handwriting by the nurses and everybody else, but we will show
23 you that throughout the trial, and I'm not making any
24 accusations at this time. Like the Judge told you, I'll let
25 you make your mind up about that, because I wasn't there and I

1 don't know, and guess what, neither one of these other lawyers
2 were there, and they don't know either. There are only a few
3 people that know what happened there.

4 But at any rate, he calls Dr. Young as a consult, CONS,
5 colon, and he says, "Case was discussed with Dr. Richard
6 Young, on-call urologist, who requests to see the patient on
7 Monday since the patient's pain is under control." So what
8 the evidence will show, everybody agrees if she had been
9 brought to the hospital on Saturday -- if she had been kept at
10 the hospital she would be here with us, if she had been
11 brought back to the hospital she would be here with us, and if
12 she had been brought in on Sunday she would be here with us,
13 at a minimum, if not maybe even early Monday morning it was
14 still possible, and Kelly would still be here with us.

15 Now, ladies and gentlemen, what happened after that is,
16 after Dr. Young asked to see her on Monday instead of
17 Saturday, they are going to tell you they don't remember the
18 specifics of that phone call. Some of the specifics that they
19 do remember is, Dr. Law said he had to call Dr. Young several
20 times before he ever answered the phone. What Dr. Young will
21 tell you is, yeah, he knew about the results of the CT, but
22 still didn't think he needed to come down to the hospital to
23 see her. In fact, I don't think Dr. Young -- I think the
24 evidence will show that Dr. Young didn't go to the hospital
25 all weekend, even though he was the on-call urologist. He's

1 the one that, from the by-laws of the hospital, that had to
2 respond to any urologic emergency, but only if Dr. Young (SIC)
3 asked him to. He could do a telephone consult, and if they
4 agreed then they agreed, based on what he was telling him.

5 Dr. Young is here today before you to tell you that he
6 shouldn't be here because he didn't even have a
7 physician/patient relationship with her, because he didn't see
8 her personally, or lay hands on here. Well, the Judge will
9 charge you the law on that at the end of the case, but in just
10 a word or two, the law on that is, if the doctor agrees to see
11 the patient, and the patient agrees to see the doctor, then
12 there is a physician/patient relationship, and I submit to
13 you, not only that, but the decision, their joint decision
14 which we will prove to you through testimony, their joint
15 decision that she was okay to be discharged, without anybody
16 knowing whether she had a fever or not, is treatment. That is
17 the reason she's not here. Okay. That is treatment. But he
18 still denies that he even has a physician/patient relationship
19 with her. We tell you more about that.

20 Let me tell you what else they are going to do. In this
21 typewritten report under consult, not under discharge
22 instructions or anything like that, Dr. Law dictated in here,
23 "I did explain to the patient, however, that if her pain comes
24 out of control or she has increasing knowledge of vomiting,
25 fever or chills she is to return to the emergency department

1 immediately." You are going to hear some discrepancy about
2 whether Sean and Kelly were told that. Okay. Now, I'm not
3 going to sit here and try and resolve that factual dispute,
4 because I don't know if it was told, if it was not told, or
5 whether they didn't understand it, or whether they didn't
6 hear. You will hear about studies that patients hear and
7 understand very little of what doctors are saying, using the
8 language, etcetera, so that will be for your decision later
9 on.

10 But what we do know about discharge instructions are the
11 written discharge instructions that were given to her, and
12 what the written discharge instructions -- oh, I forgot to
13 tell you one more thing about the physician/patient
14 relationship. Not only did he ask to see her Monday instead
15 of Saturday, and not only did they agree to go, but Dr. Law
16 made Sean agree to go at 8:30 -- well, Dr. Law didn't do it,
17 but certainly the discharge instructions do it -- he needed to
18 call 8:30 Monday morning, not Tuesday, not Wednesday, not
19 Thursday, but 8:30 Monday morning, the very next office hour
20 that that urological office was open, which Sean did.

21 When he calls at 8:30 Monday morning -- when he calls at
22 8:30 Monday morning they tell him that Dr. Young is in surgery
23 all day, which the evidence will show had been planned for
24 weeks, and Dr. Young knew that on Saturday, that he was in
25 surgery and they couldn't see her till three o'clock.

1 Now more about the physician/patient relationship. Not
2 only did they have to agree to do it, but we have in writing
3 where Kelly signed to allow her records to be forwarded to Dr.
4 Young on Saturday, okay. If he's not her physician then
5 there's -- maybe some of you have heard HIPAA law, and the
6 privacy of medical records, then he had no business having her
7 medical records. He had no business hearing about her, he had
8 no business especially having these medical records being
9 forwarded to her (SIC) office.

10 Now, let me get back to the discharge instructions that
11 we know she got, there is no argument about, because you know
12 why, they get to -- they make you sign the written discharge
13 instructions. And now what's important about these discharge
14 instructions? What's important about these discharge
15 instructions that they took home with them -- and you've got
16 to understand, they don't have the medical records where Dr.
17 Law supposedly dictated this at the -- before they even left
18 the hospital. You don't have your medical records when you go
19 home, but everybody agrees they did have these written
20 discharge instructions. These written discharge instructions
21 are contradictory to what it says on there, in this sense, in
22 this sense, it doesn't say if you -- and mainly it talks
23 more -- you know, it talks more about pain and nausea, or
24 repeated vomiting, fever, if you develop any of that call or
25 come back to the Emergency Room, not come back, call or come

1 back.

2 They took Sean's -- they took -- so when they go home
3 they have these with them. They leave the hospital, they
4 leave the hospital at twelve, and within the hour they've
5 given Kelly -- Dr. Law had given Kelly a prescription for
6 pain, Percocet for pain. It has some Tylenol in it and some
7 pain medicine. Sean drives to Wal-Mart, drops -- drops the
8 prescription off, drives Kelly home, and then goes back and
9 picks up her prescription, but within the hour he took her
10 temperature and -- Sean took her temperature. She was looking
11 flushed, and she was sweating a little bit when -- even on the
12 way out to the car from the hospital, and her temperature was
13 one-oh-one point three. Now, they are even going to argue
14 with us about what a temperature is. Dr. Young says that a
15 fever is a hundred and one point five. Most experts will tell
16 you that a fever is any elevated temperature. What most of
17 the experts will tell you, and what most of the literature
18 will show you, is that a clinically -- quote, clinically
19 significant fever to a physician is a hundred point -- over a
20 hundred point four, one hundred point four, not one-oh-one
21 point five.

22 But at any rate, within the hour she had a hundred and
23 one point two, a hundred and one point three, somewhere
24 between there and a hundred and one point six, because Sean
25 took her temperature all weekend and it never varied between

1 those numbers, which he thought was a little strange, to the
2 point where -- that was Saturday -- to the point where, on
3 Sunday, when they had friends coming over, he asked the
4 friends to stop by -- they said, can we do anything. He said,
5 yes, you know, Kelly is resting, she's lying down, but you can
6 -- you know, his thermometer is where it never varies between
7 these two numbers, you know, between one oh one point two or
8 three and one oh one point six. He said, I want to make sure
9 it's working, so he got the friends, who you will hear from,
10 to stop and buy a new thermometer. Same number. So the new
11 thermometer reads the same as the old one.

12 So they go through that, I mean, still he's not getting
13 excited because the -- also the discharge instructions that
14 they had to sign before they left the hospital, not only do
15 they tell you if you have that for a kidney stone, but they
16 give you medication discharge instructions, which say that the
17 medicine we gave you can make you nauseous, the side-effects
18 of the medicine that we gave you, some of the side-effects are
19 nausea and vomiting, but yet he's suppose to call or go back
20 to the Emergency Room for any increased nausea or vomiting.
21 There are pain medications that you can have that don't -- I
22 think most pain medications will make you nausea or vomiting,
23 but y'all have to make your mind up about these instructions
24 and whether they are contradictory, and whether they are
25 confusing to somebody that's at home that's not a doctor,

1 that's not a nurse, that's not an EMT, okay, whether they
2 should understand that or not. That's going to be in your
3 provence, ladies and gentlemen.

4 But anyway, on Sunday morning Kelly woke Sean up and she
5 had terrible chills, she was just chilled with fever, so he
6 warm -- he puts blankets around her and tries to -- he hugs
7 her, he's trying to warm her up because she's screaming she's
8 cold, and like anybody would do for anybody, he's trying to
9 warm her up, and he starts at some point -- at some point he's
10 reading the discharge instructions where it says call or come
11 back. So he calls South Strand, he asks for the doctor on
12 duty when the phone was answered, and he spoke to a female.
13 He doesn't know if it was a doctor or a nurse, but the
14 evidence will show the same nurses were working on Sunday was
15 were working on Saturday. And so he calls up and he gives
16 them all the symp -- we were there yesterday with a kidney
17 stone, you know, Sean Fay, Kelly Fay is my wife, we were sent
18 home -- with no antibiotics, by the way -- and now she's got
19 these terrible chills, and the response he got was -- and I'm
20 paraphrasing because you will hear it said in a little
21 different ways, but basically the response he got was, well,
22 we're open twenty-four seven, if she thinks she needs to be
23 brought in then bring her in, and if she doesn't think so, if
24 she doesn't think she needs to come in then take your
25 medicine, drink plenty of fluids and follow up with Dr. Young

1 on Monday like you were told. So Kelly, at that point, feels
2 like she needs to go. She gets up, she gets in the shower,
3 she gets cleaned up, like most people do before they go to the
4 hospital, and when she gets out of the shower she's feeling
5 better, you know, the chills are gone and she's feeling
6 better, and she goes, you know, well, we are going to be
7 seeing the doctor Monday, tomorrow, we were just at the E.R.,
8 why go back. What you've got to determine -- what you've got to
9 ask yourself, and determine later on, is why she was sent home
10 in the first place for her and Sean to play doctor, because
11 they shouldn't have been. The expert testimony will tell you
12 that, they should never have been sent home, at the very
13 minimum, at the very minimum, when they answered the phone and
14 he said a kidney stone and fever, what they should have said,
15 come back, not if she thinks she needs to come back, come
16 back, but come back, it's an emergency, you need to get -- you
17 need to get in here and let somebody see you again. Never
18 said that. They never claim they said that.

19 Now Sean Fay's deposition, the evidence will show, was
20 taken before the nurse's depositions were taken, and that's
21 basically, not word for word -- I would worry about anything
22 that's word for word or from recollection, but that's
23 basically what Sean said in his deposition. Then I took the
24 nurses' depositions -- and you will hear the testimony from
25 the stand, and one of them we have to read because she's in

1 California, the main nurse that took care of her, and they
2 will tell you not only did -- they don't remember specifically
3 that weekend, they don't remember Kelly, okay, but they said
4 if -- so I made them assume. I said, okay, assuming for the
5 purpose of my question, okay, that Sean called up and told you
6 what he's sworn under oath that he told you, what would you
7 have done, what would you have said, and they said, we would
8 have told him that we were open twenty-four seven, if they
9 felt like they needed to be seen come on down, if not, follow
10 up with the doctor on Monday.

11 Now, I submit to you the evidence will show that Sean
12 is not clairvoyant, he can't see the future and he's not a
13 soothsayer, so their -- and the reason I'm telling you this is
14 because the evidence that the Defendants are going to present,
15 they are going to say that phone call never happened, there is
16 no proof it ever happened, you can't prove it happened, and
17 therefore you can't prove your case. It's the same thing they
18 are going to -- they are going to show you with the
19 temperature. They are going to say, you can't prove she had a
20 fever when she left here, so you can't prove your case,
21 because we didn't do our job you can't prove your case.
22 That's what they are going to tell you, you can't prove what
23 her fever was when she left the hospital.

24 And they are right, we can't prove to an absolutely one
25 hundred percent certainty what her fever was when she left the

1 hospital, but guess what, as the Judge -- as Judge Baxley told
2 you, we don't have to, we are the Plaintiffs in this case, and
3 we gladly accept the burden of proof, but the burden of proof
4 is not beyond a reasonable doubt, it's not a hundred percent,
5 the burden of proof is a preponderance of the evidence, more
6 likely than not, that's what the burden of proof is in civil
7 court.

8 Y'all have all seen the statue of the Lady of Justice
9 with -- holding up the scales of Justice. Judge Baxley will
10 charge you the law on that at the end of the case, and what
11 the Law say is, our burden of proof is, if we tip the scales
12 ever so slightly. It doesn't have to be like this, I think it
13 will be like this, if we tip the scales ever so slightly in
14 our favor then you should return a verdict for the Plaintiff.
15 If the Defendants tip the scales in their favor you should
16 return a verdict for the Defendants. If it remains equal that
17 means we haven't met our burden of proof too, then you would
18 return a verdict for the Defendants. That's the law. That's
19 what he's going to tell you.

20 I submit to you, ladies and gentlemen, I will promise
21 you we will give you sufficient evidence with which to make
22 your decision. I won't promise you anything, because what I
23 promise you I want to be able to follow through on. I want
24 you to know when I tell you -- when I tell you I'm going to do
25 something we're going to do that, and I'm going to give you

1 sufficient evidence to make your decision on.

2 Now, let me tell you one other thing that goes exactly
3 with what the Judge told you. This case is ten percent
4 medicine and ninety percent common sense, and that's the
5 truth, I mean, that is just an absolute truth. Once you learn
6 that ten percent of the medicine that you need to know, the
7 other ninety percent of this case is absolute common sense,
8 and you've got hundreds of years combined between all of y'all
9 of common sense, and as common sense especially comes into
10 play where you know a kidney stone and a fever is an
11 emergency, and you are in the hospital and you don't take a
12 temperature for over four hours. That's where your common
13 sense comes into play.

14 Now, the Defendants are going to produce evidence. They
15 are going to bring in -- and let me just say something.
16 They've brought in some of the finest lawyers in South -- in
17 North and South Carolina to defend this case, and they need
18 to. They are going to put up experts that are going to get
19 into testimony that's going to get down to the microbiology of
20 a white blood cell to try to prove that she didn't have a
21 fever when she left there. Our experts will tell you
22 differently. You will have a chance to make your mind up
23 about what makes more sense to you when the case is over, and
24 after you've heard all the evidence, because you can't do it
25 now.

1 Ladies and gentlemen, bear with me one moment, if you
2 would. The only thing I'm afraid of standing up here, is that
3 I won't say what I want to say to you, and I won't get another
4 chance to talk to you maybe for a week or a week and a half.

5 At any rate, I think we were on Sunday. So after the
6 phone call and they decided -- she got out of the shower and
7 she got -- and she decided not to go back Sean calls the
8 Doctor Monday, they made the appointment for three o'clock,
9 and then about 9:30, which was late for him to go to work, but
10 I mean, he didn't -- see, the ironic thing about this is, the
11 evidence will show you that everybody except for Sean and
12 Kelly knew that a kidney stone and a fever -- one nurse said
13 she didn't know that, but the other ones said they knew it
14 from nursing school. They were the only two that didn't know,
15 that did not know that a fever and kidney stones is an
16 emergency. I mean, who thinks because you've got a fever
17 you've got to rush somebody to the Emergency Room. Not many
18 people without medical training that I've ever seen have known
19 this.

20 Now -- so, he leaves to go to work, and what -- when --
21 she was resting on the -- she got up Sunday morn -- Monday --
22 Monday morning, she took a shower, and then she went to lie
23 down on the couch, he kissed her goodbye, told her he loved
24 her, and he went off to work. He was going to come back --
25 told her he would come back and pick her up and take her to

1 Dr. Young's office at three o'clock. At some point in time
2 that day Sean was going to call -- was calling her to check on
3 her and he wasn't getting an answer. He take -- the evidence
4 will show he takes -- he assumes that she's still napping on
5 the couch and doesn't think that much about it, and then after
6 a few more times he calls he still doesn't get an answer, and
7 then he goes home to get ready to take her to Dr. Young's
8 office to the urologist. Well, I'm not going to get into
9 detail about what he found when he opened the door, but let's
10 just say it's not going to be the easiest part of the trial.
11 Kelly was in horrible, horrible, horrible shape when he walked
12 in the door. She was in extremis. She was unresponsive. She
13 was on the couch. She had lost all her bodily functions, but
14 she was still alive, she was still breathing, and he called
15 911 and they rushed her to Grand Strand, and the doctors
16 there, they did everything they could, they did everything
17 they could, but she died at ten o'clock that night, just --
18 just a little over forty-eight hours after she had been to the
19 emergency room, and the Autopsy Report will show that that's
20 what she died from, was this kidney that was obstructing, that
21 let get infected, that turned into pyelonephritis, which is a
22 kidney infection, and she got septic, went into septic shock
23 and died.

24 Now, ladies and gentlemen, they are going to -- the
25 Defendants are going to try to do a couple of things with

1 their evidence. They are going to try to make you not like
2 Sean. They are going to try to make you think he doesn't tell
3 the truth. They are going to try to make you think it was his
4 fault. They are going to try to transfer the responsibility
5 of taking care of a kidney stone from an E.R. physician, three
6 nurses, and a urologist, to Sean Fay who, at the moment --
7 wasn't then, he was a computer guy then -- who now, you will
8 hear, is a police officer for the City of Myrtle Beach.
9 That's the evidence they are going to put up now. Now what
10 evidence are they going to put up to show that? They will
11 say, well, because when he calls 911 on Monday in a panic
12 state they wrote -- that EMS wrote down she was febrile last
13 night, that means that she wasn't febrile the day before.
14 That's the kind of negative inferences they want you to make
15 from the evidence, like he was suppose -- like he was suppose
16 to stand there and give them complete history from the time
17 they went into the hospital on Saturday when she's dying, and
18 she needs to get to the hospital. At any rate, they are going
19 to put that sort of testimony. They are going to put up
20 testimony through experts to say, oh, this couldn't possibly
21 have been there Saturday, couldn't possible have been there
22 Saturday. Our experts are going to tell you different. Our
23 experts are going to tell you what they should have done, why
24 they should have done it, that in their opinion she would have
25 been febrile, she would have had a fever. That's another

1 word, febrile, afebrile, which are hard to tell the difference
2 unless you are listening very closely. Afebrile means she
3 doesn't have a fever, febrile means she had a fever, that she
4 had it before she left the hospital. Excuse me. In essence,
5 they are going to try to confuse the case with complicated
6 medicine, when I've already told you pretty much what you need
7 to know to apply your common sense to.

8 Now, you are also going to hear questions from the
9 Defense, ladies and gentlemen, from Sean Fay, but you are
10 suing for money, aren't you, you are suing for money, like
11 there's something immoral or unethical about using the civil
12 justice that Your Honor bragged on, and that we all brag on,
13 and that we need -- it's the only way to resolve disputes in
14 this Country. It may not be perfect, but it's the best
15 justice system in the world. And I will -- I will be the
16 first one to tell you right now, at the end of the case the
17 answer to that question is yes, we are suing for money,
18 because that's the only thing that mere mortals can give Sean
19 Fay and Kelly Fay in the way of justice. We are asking for
20 justice, and unfortunately the only way that can be done is in
21 terms of money. If they can bring Kelly Fay back we'll drop
22 this suit today, but if they can't, then we are seeking -- and
23 Sean Fay is in here, he wants justice, and he wants full
24 justice, not half justice, but complete justice.

25 THE COURT: All right, Counsel, I'm going to direct you

1 not to argue -- no argumentation in opening statement, please.

2 MR. FOSTER: Yes, Your Honor. I apologize.

3 THE COURT: All right. There's been no objection from
4 Defendants, however, do not argue in opening statement.

5 MR. FOSTER: I apologize, Your Honor. I'm about to
6 wind up, Your Honor.

7 THE COURT: Thank you.

8 MR. FOSTER: Ladies and gentlemen, our expert economist
9 -- when I tell you that we are going to ask you for a verdict,
10 we are going to ask you for a large verdict, so I don't want
11 you to be shocked at the end of the case. It's going to be a
12 large verdict, and you may ask me why, in addition to the fact
13 that this snuffed out a twenty-five year old life. Our expert
14 economist has sat down with the numbers, and has figured out
15 the numbers, and reduced it to present value, as the law
16 requires, and has taken out for personal consumption, and has
17 taken out for everything else, and he will tell you that the
18 economic numbers, the economic damages in this case alone, not
19 anything to do with Kelly, not anything to do with Sean, and
20 what they went through, what both of them went through, is
21 going to be -- depending on what her boss, Buddy Lindsey
22 testifies to, as to contingencies about her career path,
23 somewhere between -- and he will give you the exact number,
24 depending on what Mr. Lindsey testifies to, somewhere between
25 One Point Nine something Million Dollars and somewhere a

1 little over Three Million Dollars, and you will know by the
2 end of the case which number it is, so when I tell you it's
3 going to be a large -- we are going to ask for a large verdict
4 that's why I tell you that. I mean, without anything else
5 it's a large verdict, just the economic damages in the
6 hospital and those figures, the hospital bills.

7 Ladies and gentlemen, again, I've taken more time than I
8 wanted to take, and I hope I haven't bored you, but I'm going
9 to sit down and as painful as it is to hear three people argue
10 exactly opposite of what you did, after you do it, you are
11 going to hear three opening statements from the Defense
12 Counsel, and all we would ask you to do is to keep in mind
13 what happened in this case, and don't make your mind up until
14 you've heard all the evidence. We are not asking for an
15 uneven playing field. We want you to hear all the evidence,
16 and then go back and render a verdict that speaks the truth,
17 that gives justice, and if you do that we can't ask anything
18 more from you.

19 Thank you very much.

20 **THE COURT:** All right, ladies and gentlemen, let's take
21 our morning break at this time. We are going to take a break
22 for about fifteen to twenty minutes or so. If some of you
23 wish to go outside to take a smoke break we will make that
24 available to you as well.

25 Let's all remain where we are as our jury departs the

1 courtroom.

2 Please don't discuss the case, but enjoy your break.

3 If you want to leave your notes in your seat you may do
4 so.

5 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
6 JURY.)

7 THE COURT: All right. We are in recess now, subject
8 to the call of the jury.

9 (THE FOLLOWING TAKES PLACE AFTER A BREAK AND OUTSIDE THE
10 PRESENCE OF THE JURY.)

11 THE COURT: All right. Thank you. Please be seated,
12 ladies and gentlemen.

13 I'm told the jury is back from their break, and please
14 bring in the jury, Mr. Nobles.

15 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
16 JURY.)

17 THE COURT: All right. Welcome back. We trust you had
18 a good break. You will recall we are in opening statements.
19 We now move to the Defendants.

20 Counsel, please proceed.

21 MR. TODD: May it please the Court.

22 THE COURT: Mr. Todd, yes sir.

23 MR. TODD: This is my opportunity to talk to you
24 briefly, and I do want to talk with you, but before I really
25 talk to you I want to see if I can tell you what this case is

1 about in one minute. I'm not going to clock it one minute.
2 You will -- but I want to see if I can just put this case into
3 one -- summarize it in one minute, and that is that Kelly Fay
4 came to the Emergency Room at South Strand in January of 2002.
5 She had a kidney stone. She was correctly diagnosed. Her
6 vital signs were stable. Her temperature was taken on
7 admission, and it was normal. She was treated. The pain that
8 she arrived with got better, and her pain was under control,
9 and she was referred to a urologist for follow-up, and she was
10 given instructions that, if you develop a fever -- she was
11 given -- Dr. Law talked to her, sat down, talked to her and
12 her husband, says, if you develop a fever, you develop nausea
13 and vomiting you need to come back to the Emergency Room
14 immediately. She was given the written discharge instructions
15 that says, you need to call or come back to the Emergency Room
16 if you develop a fever, nausea and vomiting, and was told in
17 those instructions as well, you need to call your doctor, you
18 need to call the Emergency Room to arrange to be examined.

19 She went home, and the evidence will show that on Sunday
20 she got very sick, that she didn't come back into the
21 Emergency Room, and that's what this case is about, when they
22 make the decision not to come back to the Emergency Room.

23 My name is Monty Todd. We met earlier. Randy Lee and I
24 represent Grand Strand, and South Strand. You probably,
25 living in the County, know that Grand Strand is a hospital at

1 82nd Avenue North, full service hospital. The actual care at
2 issue in this case took place at South Strand, which is down
3 at Surfside Beach. It's an ambula -- it has an Emergency Room
4 and an ambulatory care clinic, and it's there that the issues
5 in this case arise.

6 So, we come here, and we put this dispute in your lap.
7 We call on you to decide this case for us, because as the
8 Judge told you yesterday, in our system of justice disputes
9 are decided by jurys of individuals. There are people -- you
10 come from different walks of lives. You've got different
11 backgrounds. As far as I know none of you had any medical
12 training. We know a little bit about you. No medical
13 training, no real expertise about nursing or doctors, or
14 kidney stones, but we call you in here to decide this dispute,
15 we put this dispute in your lap because that's how it's
16 resolved. I know that when you got your jury summons, or
17 whenever it was, nobody -- and you've got busy lives, and you
18 are called out of your busy lives to come in here and decide
19 this dispute, and it is a commitment, it is a sacrifice, but
20 it's part of -- a vital part of our Democracy, and so we call
21 upon you to come in here and bring your twelve sets of eyes
22 and ears, and your common wisdom, and your common experience,
23 and put that to the evidence that you will hear from stand and
24 decide this case.

25 Now, you know, it's a lot to ask for you to come in here

1 and make these decisions about expert witnesses, urologists
2 from Duke and Georgetown University, and doctors, and decide
3 it. It is not easy. Nobody likes to have to decide between
4 two sides, but you were called to do it, and you were given an
5 oath, and that oath should be your guide for how you decide
6 this case. I tried to write it down and so that I can say it
7 correctly, but it's to well and truly try the issues joined in
8 this case, and a true verdict render according to the Law and
9 the evidence. It's to come in here, no friends to reward, no
10 enemies to punish, but to come in here and take a cold, hard
11 objective look at the facts of this case and make a decision.
12 You have to -- the oath doesn't say we are going to decide
13 this case because of sympathy. We know that Kelly Fay --
14 nobody is going to say that Kelly Fay was not a tremendous
15 young lady. We won't say that. If all we had to decide was
16 that, that this was a tragedy, we wouldn't be here, we
17 wouldn't. We could figure that out. But you have to decide
18 the case according to the oath that you took, and not based on
19 sympathy, not based on whether somebody is white or black, or
20 young or old, or male or female, or whether somebody is a
21 corporation or an individual, but a cold, hard objective look
22 at the evidence that you will hear from the stand, using your
23 common sense.

24 Now, I wrote this down because I want to sort of use it
25 just kind of to keep me on track, try to stay on track so I

1 don't get too far afield. But here is the oath, and what it
2 talks about, to well and truly try the case, and a true
3 verdict render according to the Law and the evidence. Now,
4 the Judge is going to charge you the law. There's a lot we
5 will disagree with. The lawyers -- there will be plenty of
6 disagreements among the lawyers in this case, but one thing
7 that we don't have to -- well, we may disagree about the law,
8 but that really doesn't matter, because Judge Baxley, at the
9 end of the case, will charge you what the law is. He will
10 tell you what the law of this case is, and under your oath you
11 are to apply that law, you are to accept that law. And there
12 are certain things that I think, when you hear Judge Baxley
13 charge you, that he will tell you, and first he will tell you
14 that, you know, just simply because there was a bad result,
15 because there was a tragedy, a death of a young girl, that
16 doesn't mean that somebody is entitled to recover. That's not
17 enough. There's got to be -- the Plaintiffs have to prove
18 that there was a breach of the standard of care. In other
19 words -- and the Judge will charge you what the Plaintiffs
20 have to prove. They have to prove what the standard of care
21 is, and it's essentially what is ordinary, what is accepted,
22 what is reasonable under the same and similar circumstances,
23 what do other doctors, what would they do in this same or
24 similar circumstance, what would other nurses, what is their
25 standard, what do they do in these circumstances. It's not

1 based on hindsight, because here we are eight years later, we
2 can all look back and say, you know, things could have been
3 done different, but it's not based on hindsight, it's based on
4 the information that they had there and then at that time.

5 Now, the law -- Judge Baxley will tell you that doctors
6 or nurses are not held to a standard of perfection, it's just
7 a standard of reasonableness, what's ordinary, and what's
8 accepted. And you will hear law about that, and Judge Baxley
9 is going to charge you the law, and what he says is the law,
10 not what I say, not what the Plaintiff's lawyer says, it's
11 what Judge Baxley says, because he is the judge of the law.
12 You are the judge of the facts, and so you have to decide the
13 facts. You have to weigh the evidence. You have to put it to
14 your test.

15 And so at this time I want to talk a little bit about
16 the evidence. I don't want to go into great detail, because
17 you are going to hear it over the next, four to five to six to
18 seven days, and it will come from the stand, but I do want to
19 talk to you about what you are going to hear, and there will
20 be different types of witnesses. There will be witnesses who
21 are experts, who will come in here and will talk about, here's
22 what the standard is, here is what is expected, here is why
23 the standard was met, here is what happened, and they will
24 look back and talk to you about certain things in medicine.
25 Plaintiffs will call them, we will call them. And you have to

1 judge those witnesses just like you would anyone else. You
2 have to put their credibility to your test.

3 Now one thing is -- and you will hear, but I want to
4 just kind of tell you what happened, because the witnesses
5 won't be called in any particular order. They don't come in
6 and -- and it's not like a book where you start at the
7 beginning and go to the end. The witnesses kind of -- they
8 may come -- the witness who was personally involved may not be
9 the first witness called, so you -- when you are putting what
10 happened together from the witness stand it may not come in
11 chronological order, but here's what -- when it's all put in
12 here's what the evidence will show happened in this case, is
13 that Kelly Fay, on January the 26th of 2002, some eight years
14 ago, woke up. She had a pain in her right lower flank.
15 Excuse me. She had had a kidney stone before, and this feels
16 like the kidney stone I've had, and so they got up and the
17 pain was so great that they decided we need -- she wanted to
18 go to the Emergency Room, and so they went to South Strand,
19 which is three miles from her house, took them five minutes to
20 get there, so within thirty minutes of waking up with this
21 pain she's in the Emergency Room, and it's January the 26th.
22 There is nobody in the waiting room. We know -- you know, we
23 all dread going to the emergency room and waiting and waiting,
24 but -- which happens -- but she walks in and there's no one in
25 the waiting room. Sean goes to the desk to give the

1 information, and Kelly Fay is met at the door by the nurse,
2 the triage nurse, Denise Dressel, who takes her in and does
3 triage, which is essentially who will decide, you know, who
4 needs -- who is in the worse shape, who needs to get to be
5 seen first. In this case there was nobody there, so she walks
6 in, she's immediately triage, vital signs were taken, the
7 temperature was normal, blood pressure normal, heart rate
8 normal, respirations, all normal. Within five minutes she's
9 seen by Dr. Law, and he starts working up his -- he does an
10 exam, he takes a history, and he begins working up his
11 diagnosis. His working diagnosis, as I think he will tell
12 you, was yes, it's probably a kidney stone, and he orders x-
13 rays. They call it a KUB. You may hear that. And what KUB
14 is kidney, ureter, bladder, but x-rays, and it shows what is
15 most probably a kidney stone. It's not really diagnostic
16 because the x-rays, you know, they don't -- just a plain x-ray
17 doesn't give you for the definition you want, but pretty good
18 proof, pretty good proof, with her symptoms, with her
19 complaints, with her prior history, that it's a kidney stone,
20 and he treats her with medicine, some pain medicine, and the
21 pain then is controlled. She comes in with like a pain scale
22 of eight out of ten and it's down to five or four, and with
23 more medicine gets even better, but it's treated.

24 He does a urinalysis because with a kidney stone you are
25 -- you want to see, is there -- is there a urinalysis tract

1 infection, and he does a urinalysis, which is the test for a
2 urinary track infection. It's normal.

3 And the nurses -- the nurse takes -- she goes back and
4 takes vital signs, heart rate, respirations, and those are
5 recorded in the chart, and here's one thing I do want to show
6 you. This is already -- we have already agreed in evidence,
7 but when the doctors and the nurses are treating the patient,
8 as the patient is in the Emergency Room they are filling out
9 this sheet, these two sheets, not on this. These are blown up
10 sheets, but we've got the chart, but basically it really sort
11 of tells us, you know, tells a story, and this is being filled
12 out as the treatment is being rendered. Time of arrival, you
13 can see it right here, eight o'clock, triage time, eight
14 o'clock, and then we'll talk about this -- I don't want to go
15 into details -- we've had this case for a long time, we've had
16 depositions and have talked about this in detail -- but we
17 realize this is the first time for you to hear it, so we want
18 to explain to you what's going on. More triage. But anyway,
19 at 8:04 Dr. Law is seeing the patient, four minutes after she
20 comes in, and he starts treating and doing his exam, giving
21 the treatment and making the diagnosis. Here at 10:20 you see
22 blood pressure, heart rate, respirations, these are all
23 normal. They've actually gotten better from the time she's
24 come in, probably because she's gotten some pain medication to
25 relieve the pain.

1 But in any event, the diagnosis is made, the treatment
2 is given, and Kelly is -- Dr. Law sits down and talks to her,
3 and he dictates his report as soon as -- as soon as Kelly
4 leaves the Emergency Room, and this is the report. This is
5 dictated -- he dictates it right then. You will see right
6 here, I did explain to the patient, however, that if her pain
7 becomes out of control, or if she has increasing nausea,
8 vomiting, any fevers or chills, that she is to return to the
9 Emergency Room immediately. This will be in evidence and you
10 will have this at the end of the case in the jury room. But
11 that is dictated at January 26, at 11:38, so there is sometime
12 Dr. Law makes the decision to discharge her, the nurse does a
13 discharge, talks to her, gives the instructions, but he
14 dictates this at 11:28 on January 26, while Kelly Fay is still
15 in the Emergency Room.

16 There's also -- the Plaintiff's attorney referred to
17 written discharge instructions, and let me just give you a
18 little bit of background about how these instructions come
19 about. There's a system at the hospital, at South Strand,
20 where the doctor makes a diagnosis, and the nurses -- you
21 know, they give the diagnoses. In this case was kidney stone.
22 They are able to type into a computer kidney stones, and
23 there's a system called EPIC, which is a -- basically it's a
24 national, kind of a standardized set of instructions which
25 will apply to kidney stone patients, so that it's -- they get

1 the instructions that apply to them. It would help if --
2 reading my mind now I'm talking to y'all -- but these are
3 instructions that are given to the patient, the nurse
4 discusses them with Kelly Fay, with Sean Fay, and discusses it
5 with them, and there's two things in here that I think you
6 should have. This is -- Kelly Fay has signed for them, but it
7 says right here, "See your doctor for follow-up or as advised.
8 Call or go to the Emergency Room right away if you develop
9 fever, or intense pain, or repeated vomiting."

10 Then, just about where Kelly Fay signed, "If you do not
11 continue to improve, or if your condition worsens, please call
12 your doctor or the Emergency Room right away so that you can
13 be examined."

14 So Kelly Fay, she was appropriately diagnosed. She was
15 treated. Her vital signs -- she was stable on discharge, but
16 she was sent -- you know, got an appointment with the
17 urologist on Monday, or call -- call him Monday to make an
18 appointment, call him first thing Monday morning to make an
19 appointment, and if you get a fever, if you get worse, you
20 need to call -- make it -- to be seen. That's what the
21 evidence will show.

22 Now what will the evidence show after that? The
23 evidence will show after they left the Emergency Room, on
24 Sunday, that Sean Fay -- we know this because he was --
25 started doing a blog -- that on Sunday she got very sick. She

1 developed a high fever, developed chills, she was nauseous and
2 vomiting, and she just simply did not come back, and they
3 talked about a phone call. The nurses don't remember a phone
4 call, but it's -- what's put in the blog is that they made a
5 call. They would have -- they were coming back into the
6 Emergency Room and changed their mind. We don't know why, but
7 they made the decision to come back in after the phone call,
8 then did not.

9 So, what the evidence will show is that on Sunday Sean
10 Fay, watching the football games, he was doing blogs, but he
11 didn't go -- he didn't take the five minute trip back to South
12 Strand to be seen again.

13 Now what did he do Monday morning? He got up, went to
14 work Monday morning, then when he comes back he finds his wife
15 in dire straits, and at that point there was nothing that
16 could be done, but there was time -- if he had followed the
17 instructions then we wouldn't be here. If he had gone -- if he
18 had taken her back to the Emergency Room we wouldn't be here.

19 Now, a couple of things that I want to talk to you about
20 is, the other things is -- I think I've talked about the law
21 and the evidence -- just a little bit about the issues, and
22 the issues are a little bit different. There's three
23 Defendants, and with me, the hospital, it's essentially, did
24 the nurses comply with the standard of care, and that will be
25 Denise Dressel and Grace New, and Mary Beth Doolittle, who is

1 now Mary Beth Schustek, did they comply, and then there's
2 basically two things that the Plaintiffs complain about, not
3 only just talk about them, but I want to argue about them, but
4 there's just a couple of things that I want you to just be
5 considering as the evidence comes in. The first is about the
6 fever, or taking the temperature. Let's talk about the
7 temperature, because when she comes in her temperature is
8 taken and it's normal, it's ninety-eight point one. Her
9 temperature is taken, and there are policies and procedures
10 about taking temperatures, and I expect that you will have --
11 that those policies and procedures will be put in. They are
12 not in evidence now, but I expect that by the end of this
13 trial they will be put in. But what they show is, when the
14 patient comes into the E.D., Emergency Room, there should be a
15 complete set of vital signs including temperature, heart rate,
16 pulse, respirations, and if it's normal you don't need to take
17 the temperature again, unless there is some indication, and
18 I'll talk about those indications, is what -- is what the
19 indications would be, or actually in this case, the lack of
20 them. First, when she came in the temperature was normal, and
21 there are certain things that -- if you have a fever there are
22 certain clinical symptoms, there are certain things that will
23 happen, for instance, if you have a fever your heart rate will
24 go up, your blood pressure will go up, and that didn't happen
25 in this case, and we say that there were two other heart rates

1 and blood pressures, they didn't go up. She didn't complain
2 about any kind of fever while she was in the Emergency Room.
3 Now, she just had Dr. Law talk to her, says if you get a fever
4 you need to come back immediately, and if she had a fever when
5 she was in the Emergency Room -- Kelly Fay, we don't dispute,
6 was a bright lady. I think she can say, you know, I'm feeling
7 a little warm. That didn't happen. There was a normal
8 urinalysis, which is what you look for. That's the test to
9 see if there's a urinary track infection. It was normal.

10 And just when you put it all together we think you will
11 conclude that first, the nurses met the standard of care, they
12 complied with what's reasonable and accepted and ordinary
13 under these circumstances, and she didn't have a fever. And
14 there will be experts who will talk about it, and do analysis,
15 and talk to you about that, about when we say that, and you
16 can conclude that based on your own common sense.

17 The other thing is -- that the nurses talk about is --
18 or that the Plaintiff will talk about with the nurses is the
19 phone call. Well, what we know about the phone call is that
20 after the phone call was made they were making plans to come
21 back into the Emergency Room, and just, for whatever reason,
22 didn't do it. We also know that the discharge instructions
23 say, if you develop these things you need to come in, you need
24 to call to arrange for an appointment.

25 Now, I'm sure there's plenty of things I didn't discuss.

1 You will hear a lot of evidence, but at the end of the day
2 it's going to be your decision, and you've got to put it to
3 your good common sense. Keep in mind that, you know, when you
4 go to the Emergency Room what you are going there for, you are
5 going to get diagnosed, you are going to get stabilized, you
6 are going to get treated, and you are going to get referred,
7 and that's what happened in this case. That standard was met,
8 and what happened was -- is, she didn't follow the
9 instructions when she said, if you get worse you've got to
10 come back in, and she got sick and Sean Fay simply did not
11 bring his wife back in.

12 And at the end of the day, when the evidence is in and
13 the Judge has charged you the law, and you put your oath, you
14 put it to your test and you follow your oath, you will
15 conclude you should find a verdict -- I think you will find a
16 verdict for the Defendants.

17 MR. AIKEN: May it please the Court.

18 THE COURT: Yes sir, Mr. Aiken.

19 MR. AIKEN: Mr. Foster.

20 MR. FOSTER: Yes sir.

21 MR. AIKEN: Mr. Hewitt.

22 Dr. Law, please stand up.

23 (DR. LAW STANDS.)

24 MR. AIKEN: This is Dr. Steve Law. He was the
25 emergency physician at South Strand who saw Kelly Fay on

1 January 26.

2 Thank you.

3 I'm not going to ask them to stand up. I'm going to
4 introduce you to some other people you have not met. On the
5 first row, to the left, is Tom Meier. That's Kelly's stepdad.
6 He married Kelly's mom when Kelly was eight, and he helped
7 raise her. Next to Tom is Kelly's mom. Next to Kelly's mom
8 is Michelle Webber. She was Kelly's sister-in-law. And next
9 to Michelle is Kevin Webber. That's Michelle's (SIC) brother.
10 I want you to picture a house, picture a house. That is going
11 to be Sean Fay's house that you are looking at. Now,
12 everything that happens in Sean Fay's house is Fay
13 responsibility.

14 Now picture a hospital, but this is South Strand
15 Hospital. Now everything that happens in the hospital is the
16 responsibility of the doctors and the nurses, and the
17 technicians, and everybody who works in this building that's
18 the hospital's responsibility. And this evidence will show
19 that everything done in the hospital was reasonable,
20 appropriate, and responsible.

21 The time line for the hospital will be shown, but this
22 tragic case where a young twenty-five year old woman, full of
23 potential, full of life, died, starts in the Fay house at 7:30
24 Saturday, January 26. Kelly woke up in horrible flank pain.
25 The right decision was made in the house, she's got to go to

1 the hospital. That was the right decision. So they get to
2 the hospital. Now we go from the Fay house to the hospital.
3 She gets there at eight o'clock. On arrival as she is -
4 - as soon as she gets there they know that she's in pain and
5 they triage her. They take a full set of vitals as soon as
6 she gets there, temperature ninety-eight point one, completely
7 normal, blood pressure, one thirty over eighty-four, heart
8 rate, eighty-eight, respirations, fourteen, but pain, seven
9 out of ten. She was in pain. At 8:06 she's already in the
10 room and Dr. Law is seeing her. At 8:20 she's in x-ray. All
11 of this is clockwork. Dr. law suspects a kidney stone, so he
12 sends her for this KUB. Now that's not a definitive test
13 because she could have had appendicitis, she could have had
14 other things, but it gives you a pretty good indication of
15 what's going on, so they do the KUB, and x-ray, at 8:30. IV
16 Toradol, that's pain medicine, right in the vein, thirty
17 milligrams with an IV push. They put a needle in for an IV
18 push. 8:35, cath'd urine to lab. They put a catheter in, and
19 they want to send the urine to the lab. In the E.R. a
20 urinalysis is the determinate test for infection. The
21 urinalysis comes back completely normal. There was no blood
22 in it, there were no white cells in it, completely normal. At
23 8:35 phenergan IV push, more medicine, at 8:52, right side
24 stone KUB. The KUB is already back, and it's suspicious of a
25 stone on the right side. 9:10, pain is better. It's still

1 horrific, five to six, but it's better. 9:10, they take a
2 blood pressure, a pulse, and a respiration, all normal, at
3 9:10. At 9:30 -- now Dr. Law wants to make sure this is a
4 stone, so he orders another test, the CT. It's much more
5 sophisticated. It takes longer, but that is standard of care
6 to order it, and he orders the CT. At 9:35 she is still
7 having five out of six pain, so he orders Dilaudid. That's a
8 pretty strong medicine. It's another IV push. They put it in
9 the same line there to give her some relief. At 9:40 there is
10 no pain. She's better. At 10:20 she's back from the CT, so
11 we know what that says, and you will see it, so they want to
12 make sure she's stable after she gets back from CT. Blood
13 pressure one twenty over eighty, pulse, seventy-two,
14 respirations seventeen, no pain.

15 Now we know what it is, and we know she's better. So
16 what happens next in the hospital setting? Dr. Law says, I
17 did explain to the patient, however, that if her pain becomes
18 out of control, or if she has increasing nausea, vomiting, any
19 fevers or chills, any fever or chills, that she is to return
20 to the emergency department immediately.

21 She is discharged at twelve o'clock, noon, on Saturday.
22 This note was dictated, as Mr. Todd pointed out, on Saturday
23 at 11:38 in the morning, before she was even home. He had
24 seen her, he had treated her, she was better, she wanted to go
25 home, she was a responsible young lady, he was a responsible

1 young man, they understood these instructions, and Dr. Law
2 also writes on the records -- they will have a copy of this --
3 it's the record, call Dr. Richard Young's office at 8:30
4 Monday. I agree, Mr. Foster, he called 8:30 Monday as Dr. Law
5 told him. Then they are discharged to go home.

6 And what Mr. Fay will tell you, they get home about one
7 o'clock, on the way home they stopped by Wal-Mart so he can
8 leave the prescription for pain medicine, so he leaves the
9 prescription at Wal-Mart, and then he takes his wife home.
10 Then he gets her settled and goes back out to Wal-Mart to pick
11 up the medicine. Nobody knows how long that takes. Then he
12 gets back home, and his testimony is, from that point forward,
13 the rest of the weekend, she had fever a hundred and one point
14 three, to a hundred and one point six, from that point.

15 Then we go to Sunday, and Kelly wakes up -- and I'm
16 going to tell you how Sean Fay described it himself. Sunday
17 night he creates a blog, that's where -- it's SeanFay.com, and
18 just to kind of let whoever wants to go on there read what he
19 wants to write, and he happens to write this Sunday at 1 --
20 correction -- at 4:22 in the morning, A.M., "Sunday morning, I
21 was awake by my wife who was in major pain. This morning she
22 woke me up screaming, and she was shaking uncontrollably, and
23 was she ever, major fever, then hot flash, then major fever
24 again." We are in the Sean house -- the Fay house now. We
25 are at his responsibility.

1 That's where we are Sunday. About twelve o'clock some
2 friends come over. You will hear from them, Laura and Chad
3 Casselman. Kelly is in her room and sick. They come over and
4 they watch a football game. It's January, there was playoff
5 seasons of the New England Patriots were on T.V., so they
6 watched T.V., football game. According to Sean they left
7 between six and eight at night, and incidentally, on this blog
8 when he talks -- this is -- from that day he never mentions
9 calling the hospital, and we will have a lot of discussion
10 about whether that call was ever made.

11 At ten o'clock Sunday night there are more chills.
12 Monday morning they wake up, Sean calls Dr. Young as he had
13 been told to call. About 9:30 he goes to work. Sean will
14 tell you he called home three times and there was never an
15 answer, and he gets home about two, Kelly is in horrific shape
16 at that time. Her fever is a hundred and seven. She's -- her
17 body is eaten up with sepsis, she was sick, and they take her
18 to Grand Strand on an emergent basis, and they do everything
19 that we know of that they could have done and she didn't
20 survive. She died.

21 So, your horrific burden is to decide responsibility.
22 Does it rest in the Fay house, or at the hospital?

23 Now, sometimes on these types of cases juries are torn
24 between doing what they must do, to honor the oath they took
25 before God, to render a verdict based on this evidence, not on

1 anything else, not on sympathy, compassion, sorrow, on the
2 evidence, and that's your oath. Sometimes you are torn, do we
3 do that, or do we do what we might want to do, because we've
4 got a young woman that's dead. If you are confident, Dr. Law
5 is confident, I'm confident you will honor your oath and
6 render a verdict based on the evidence in this case, and we
7 submit to you that verdict will be for the Defendant.

8 MS. SCALISE: If it please the Court.

9 THE COURT: Ms. Scalise.

10 MS. SCALISE: Ladies and gentlemen, we met at the
11 beginning of yesterday. My name is Marian Scalise, and I,
12 along with Lydia Magee, represent Dr. Richard Young.

13 Dr. Young, I would ask that you stand.

14 Dr. Young is a board-certified urologist ---

15 Thank you.

16 ---Who never saw Kelly Fay. You will hear through the
17 evidence that Dr. Young never spoke to Kelly Fay, Dr. Young
18 never cared for Kelly Fay, never examined Kelly Fay, he never
19 billed Kelly Fay because he didn't do anything for her. He
20 never got the opportunity because she never came to see him on
21 that Monday.

22 Now, the Plaintiff has the burden of proof, but the
23 Plaintiff has to prove that Dr. Young -- I guess first, what
24 is the standard of care for a urologist, then he's got to
25 prove was there a breach of that standard of care, did that

1 breach cause any kind of damages, but before we ever get to
2 all those hurdles he has to prove -- he first has to prove to
3 you that Dr. Young had a physician/patient relationship with
4 Kelly Fay, and I submit to you, he is not going to be able to
5 meet that burden, because there was no physician/patient
6 relationship with Kelly.

7 You will hear testimony from both Dr. Law, the E.R.
8 doctor, and Dr. Young, about what happened on January the
9 26th, on that Saturday. You are going to hear that Dr. Law,
10 who is a board-certified Emergency Medicine Physician, that he
11 took a very careful history from Kelly, he did a thorough
12 physical exam, then he did the one test that he needed to do,
13 which was a urinalysis. You've heard -- everybody has been
14 talking about this urinalysis, these are the results, and you
15 will see everything is negative, everything is normal, and the
16 key on that is that, if there had been any abnormalities then
17 yes, Dr. Law would have done further testing. But when you
18 have a negative test, that's the end of the story.

19 And what's particularly important -- and you are going
20 to learn about all these things this week, this leukocyte
21 esterase, which was negative. That means white blood cells.
22 That means infection. Negative. Nitrate, negative. pH is a
23 key, is five point oh, and the reason that's important, that
24 you will learn, is that what Kelly Fay died of is something
25 called a proteus infection, and a proteus infection causes

1 your pH to be at least over seven, so this, in and of itself,
2 is definitive that she did not have a proteus infection on
3 January the 26th, because it was five point oh. That's too
4 acidic. The proteus can't live in a five point oh urine, so
5 this is really key. But you also, as you've heard, and what
6 you'll learn, Dr. Law did more than that. It sounded like a
7 kidney stone. He wanted to confirm that, so he did the KUB,
8 kidneys, ureter, bladder x-ray, he did the CAT scan, and it
9 showed -- it confirms your diagnosis, that there was a kidney
10 stone, and Dr. Law decided -- she had no signs or symptoms of
11 infection, her temperature, you heard, was ninety-eight point
12 one, she had no -- her pain was under control, no signs or
13 symptoms of infection, he decided to discharge Kelly Fay.
14 After he had done all this investigation, all this workup,
15 after he had already decided to discharge Kelly then he called
16 Dr. Young.

17 Now you will hear from Dr. Law. He didn't call Dr.
18 Young to ask for advise. He already knew what was going on
19 with this patient. He didn't call Dr. Young to come in and
20 admit Kelly Fay, or to come in and see her. Dr. Law had
21 already properly decided that she didn't have a problem in the
22 Emergency Room, and it was appropriate for her to be
23 discharged.

24 So why did Dr. Law call Dr. Young? The reason he called
25 is that, again, he's such a good doctor he knows how difficult

1 it is to get in to see a specialist. This lady has a kidney
2 stone, it may or may not pass. He wants to make sure that she
3 is seen in follow-up, and so he calls Dr. Young, and he says,
4 Dr. Young, I've got this patient -- he goes through what all
5 has happened, he goes -- and he wants Dr. Young to have that
6 information, and he says, please see her in follow-up, and Dr.
7 Young said sure, tell her to call my office 8:30 in the
8 morning on Monday and she can make an appointment.

9 Now, you know, you heard from Mr. Foster, oh, Dr. Young,
10 he knew he was going to be in surgery so why is he saying to
11 call the office at 8:30. Well, he knows that when he -- when
12 Ms. Fay would have called the office at 8:30 she would be
13 worked in as soon as he got out of surgery, that afternoon,
14 and sure enough she was given an appointment for three o'clock
15 to see him.

16 Now, what is important in all this is that you have to
17 decide, does that phone call, does that establish a
18 physician/patient relationship, the fact that Dr. Young agrees
19 to see her on Monday, is that enough, or if there be an
20 affirmative act, let there be something that where Dr. Young
21 basically sees the white of her eyes, you know, makes some
22 decision in her care, is that enough? That's for you to
23 decide. If you find, at the end of this trial, that Dr. Young
24 did not have a physician/patient relationship with Kelly Fay
25 then that's the end of your inquiry as it concerns Dr. Young.

1 Now if you decide there was a physician/patient relationship
2 then you get on the track and you start going over the hurdles
3 of what is the standard of care, was it -- was there any
4 breach, was there any causation, did that cause her death.

5 So talking about standard of care, that's such a foreign
6 term, I think, to most people who work in the law so to speak,
7 and what that means is, what would a reasonably prudent
8 urologist have done under the same or similar circumstances,
9 and I'm going to bring you two urologist. One is actually the
10 physician who trained Dr. Young. It's a man named William
11 Maxted up at Georgetown University Medical School, a sweet
12 little fellow, has a little twinkle in his eye. You can tell
13 he loves practicing medicine. And he's going to get here,
14 he's going to explain to you all -- more than you ever want to
15 know about kidney stones, because that's what he loves. He
16 loves what he does. And you will hear from Dr. Maxted that
17 he's read Dr. Young's deposition transcript, he's read Dr.
18 Law's deposition transcript, and in his opinion there was no
19 physician/patient relationship, in his opinion Dr. Law did
20 everything that he was suppose to do, he correctly diagnosed
21 the kidney stone, he correctly cared for and treated Kelly
22 Fay, he correctly discharged her, and so in essence, as I'm
23 defending Dr. Young I also will be defending Dr. Law, because
24 what Dr. Law did was appropriate, and that's why Dr. Young
25 didn't need to come in and see this patient, did not need to

1 admit her.

2 Now the second doctor I'm going to bring to you is the
3 only doctor you will hear from who is fellowship trained in
4 kidney stones, and what that means is, doctors first go to
5 medical school, then they do an internship and residency where
6 they kind of specialize. You are either going to be an
7 obstetrician/gynecologist, you are going to be an infectious
8 disease doctor, you are going to be a urologist. You go
9 through that training and then, if you want, you can go on to
10 special training, and it's called a fellowship training, and
11 Dr. Albala, David Albala, who used to be at Duke University,
12 he is fellowship trained in stone disease. He's the only
13 fellowship-trained physician that you will hear from. And
14 what he did at Duke University is, he trained other physicians
15 in these fellowships of stone disease, and like Dr. Maxted,
16 you will hear from Dr. Albala. Now he's read these
17 depositions, and he likewise, does not believe that there was
18 a physician/patient relationship. He likewise does believe
19 that Dr. Law met the standard of care, that Dr. Young met the
20 standard of care, so those are who you will hear from this
21 week.

22 Now, there are a lot of witnesses that you will hear
23 from, and I apologize for that, that there are so many, but
24 the reason we are bringing all these people in to you is
25 because we are searching -- you are searching for the truth,

1 and the only way you will get to the truth of what occurred is
2 to hear from all these different people, because at the end of
3 this trial it will be your obligation, your duty to render a
4 verdict, and a verdict in Latin -- and I can't pronounce it --
5 it means speak the truth. So you have to render a verdict
6 that speaks the truth, and at the end of the trial I'll come
7 back, we'll have our closing argument, and I will ask you to
8 render that verdict that speaks the truth, a verdict that
9 speaks the truth will be a verdict for the Defendants, a
10 verdict that speaks the truth will be a verdict that Dr. Young
11 did not have a physician/patient relationship with Kelly Fay,
12 a verdict that speaks the truth is that Dr. Young did not do
13 anything that breached the standard of care that caused
14 Kelly's death.

15 Thank you all for your time and attention. This is --
16 it's a tough case, and it's a tough case for everybody
17 involved, but we appreciate the time and attention that you
18 will give to us.

19 Thank you.

20 **THE COURT:** All right, Counsel, step up a moment and
21 let's talk about scheduling, please.

22 **(BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)**

23 **THE COURT:** All right, ladies and gentlemen, let's do
24 this. Rather than go into our first witness, I was talking
25 about the witnesses that Counsel will be calling, let's just

1 stop now and have our lunch at this time. It's twelve
2 o'clock. What I would ask you to do is to be back in the jury
3 room at 1:30. Lunch is on your own, and please, with whomever
4 you have lunch, whether it's a fellow juror or some third
5 person, please don't discuss the facts of this case. That
6 would not be appropriate, but just have a good lunch, and we
7 will see you at 1:30.

8 Any questions from our jury about scheduling?

9 If your loved ones ask you, we normally end the business
10 day at five o'clock. That is when we generally quit. We may
11 run a few minutes over, depending on where we are with the
12 witness, but -- for those who wish to know about your
13 schedule, and for you, yourself, we will probably be ending
14 today at five.

15 All right. Let's all remain where we are out of respect
16 for this jury as they leave the courtroom.

17 Have a nice lunch, ladies and gentlemen.

18 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
19 JURY.)

20 THE COURT: All right, ladies and gentlemen, let's let
21 the lawyers take about a five minute break and we'll come back
22 and resolve some issues that I have under advisement, so we'll
23 just stand down for about five minutes. All right. Court
24 will be in recess.

25 (THE FOLLOWING TAKES PLACE AFTER A BREAK AND OUTSIDE THE

1 PRESENCE OF THE JURY.)

2 THE COURT: Are you ready to go? Okay.

3 All right. I have two or three matters that are under
4 advisement, and I'm prepared to rule. I'll do this quickly so
5 we can get on about -- so you all can get on about your lunch
6 plans, as well as your preparation for this afternoon's trial.

7 The first matter I have under advisement is whether or
8 not the issue of the remarriage is admissible on the issue of
9 damages, and we are talking specifically about -- Defendants
10 raise, and I believe it was you, Ms. Scalise, the issue of
11 household services, and the actual dollar cost of those, that
12 the Plaintiff, having remarried, would -- it would be unfair
13 to claim them when there is another source for those damages.

14 Tell me, what case law, or precedent, do you rely upon
15 to support your position? Now you made a fairness argument,
16 but tell me, do you have any case law that supports that?

17 MS. SCALISE: No sir, Your Honor.

18 THE COURT: Okay. Are you aware of that decision being
19 crystallized, that particular issue being crystallized before
20 the Supreme Court, or ruled upon by the South Carolina Supreme
21 Court?

22 MS. SCALISE: I think, Your Honor, in the Smith v.
23 Walls case, there is a section in there, and in that case it
24 did say, "The remarriage of the widow does not affect the
25 damages recoverable to the beneficiaries, and evidence of the

1 remarriage is inadmissible", but then it had a paragraph in
2 there that it says, "Damages under the wrongful death statute
3 is not the value of human life lost, but the damages sustained
4 by the beneficiaries from the death", so I just feel like
5 that's -- it just doesn't seem fundamentally fair that he can
6 be rewarded financially for services that he actually is
7 already being compensated with.

8 **THE COURT:** All right. This is the Court's ruling on
9 that issue, and I want to first of all explain the basis for
10 my ruling. The case law is fairly clear that remarriage is
11 not admissible, and thus the Court is not going to allow it to
12 come into evidence, however, if the Plaintiff claims damages
13 for services beyond the date of the remarriage then I'm going
14 to allow the Defendants, in cross, to take up the issue of
15 remarriage and those services being covered.

16 Now, what I'm saying to you, Mr. Foster, is that -- and
17 it sounds like Dr. Wood's work is still in progress, because
18 you said, based on the testimony Dr. Wood will have figures.
19 Well, he just needs to curtail those damages, don't even have
20 to talk about the fact that it's a specific day I cut it off
21 at. He just needs to curtail the damages to the date of
22 remarriage. That's the only issue that the Court is going to
23 reach in on that remarriage business, and I do that because I
24 think it's fundamentally unfair. If this was a wreck case and
25 we had health insurance, and we don't talk about health

1 insurance, well that washes out because you've got subrogation
2 claims that the people end up paying the carriers back, so
3 it's not unfair to go to the jury and say these bills have not
4 been paid, but in this case I think it would be unfair for the
5 Plaintiff to be able to claim for services based on the life
6 expectancy of the Plaintiff when those services, in fact and
7 indeed, are covered by another source. So that's the Court's
8 ruling.

9 MR. FOSTER: Your Honor, can we -- can we just do this,
10 and maybe this will satisfy the Court.

11 THE COURT: All right.

12 MR. FOSTER: Your Honor, can we just do this, and maybe
13 this would satisfy the Court. Can we just not have -- put
14 those in as an element of damages, just have Dr. Wood take
15 those out.

16 THE COURT: Fine.. I actually perceive those to be a
17 minimal -- a deminimis element of your damages, and thus, if
18 you wish to do it that way -- I'm going to leave it up to you.
19 It's in your court. You can take it all the way, or you can
20 take it out, and they will be able to respond under my ruling.

21 MR. FOSTER: I want to take them out, Judge, but if you
22 would just clarify for me what I need to take out so that the
23 door won't be opened for them to do that. Would you ---

24 THE COURT: Okay. Well, it's my understanding -- and
25 what we are talking about -- I haven't looked at Dr. Wood's

1 report, but it just has to do with the contribution for
2 household services that would be provided by the deceased if
3 the deceased were still living. That's the one area that the
4 Court is referring to.

5 MR. FOSTER: All right. So if we take out household
6 services we are good?

7 THE COURT: You are clear, yes.

8 MR. FOSTER: Okay. We will take them out, Your Honor.

9 THE COURT: Very good.

10 There also has been an issue of whether or not the
11 Plaintiff's alleged affair can be brought into evidence on the
12 issue of credibility and believability. I'm going to deny the
13 Defendants the right to bring that evidence in, and exclude
14 that evidence. I do that for this reason, it's clear from the
15 opening arguments that this case is really about liability.
16 It's not about damages. This issue of an affair really goes
17 to damages, in the Court's opinion, and whether or not the
18 loss of the spouse is as great as one may perceive that it is.
19 This is not for the Court to say, this is just how I believe -
20 - in other words what I'm saying is, the Court is not saying
21 that if there was an affair the loss is less. That's not an
22 appropriate analysis. I'm just simply saying that that issue
23 goes mainly to damages, not really to liability, but if it
24 does go to liability, if the Defendants take the position that
25 the truth of Mr. Fay and the reliability is directly an issue,

1 credibility and reliability are directly an issue, I find
2 under Rule 403 that that is so prejudicial that it is
3 inappropriate because it is of minimal probative value, but
4 high prejudicial value, and thus I'm going to exclude it.

5 All right. Now, the only other issue that I'm aware of
6 had -- that we have under advisement has to do with the tissue
7 tests, and evidence from Defendants' experts about whether or
8 not those tissue blocks may be used, chain of custody. I
9 don't recall at the end of the day yesterday we were waiting
10 on me to decide that. I just want to make sure we are clear
11 that we are all on the same level with that, which is -- my
12 understanding is if the Defendants wish to bring that in then
13 they are going to have to follow the rules and produce the
14 appropriate chain of custody, and we would make the decision
15 at that time. If this is an issue that's disputed between you
16 all and you want me to take it up out of the presence of the
17 jury, and listen to the chain of custody evidence, or probably
18 better, just listen to what arguments you have that -- what
19 the testimony would show, that I can rule on that in advance.

20 All right. Now, is there anything else you all are
21 waiting on me to rule about?

22 MR. TODD: Well, one thing, and I don't think we were
23 waiting on you to rule, but it really relates to the testimony
24 of Dr. Proia and the chain of custody, but Dr. Proia is
25 unavailable next week, and we've talked to you briefly, and we

1 had intended to call him on Thursday, and I think we had even
2 mentioned that to the Court when we talked last week. We
3 understand when we talked with the Plaintiffs that they've got
4 a full slate of expert witnesses on Thursday, so we would ask
5 to call Dr. Proia out of order tomorrow afternoon.

6 **THE COURT:** Okay.

7 **MR. TODD:** Another thing I'll just go ahead and apprise
8 the Court about chain of custody, there are just a couple of
9 ways we can deal with it. One is, you know, there's a letter
10 from the hospital, or the pathologist's office, to the law
11 firm in Raleigh, sending the slides, and there is a -- sort of
12 an Affidavit from the paralegal taking the slides to Dr.
13 Proia, and so we can -- you know, we prefer not to have to
14 call live witnesses to prove the chain of custody, but if we
15 have to we will.

16 The other way we can deal with it is, I think there are
17 still some slides that can be cut, so we just -- you know,
18 rather than have to call two witnesses to establish chain of
19 custody we may very well be able to just have him bring
20 another set of slides over here.

21 I'll let Mr. Lee ---

22 **MR. LEE:** Your Honor, just to clarify, there are
23 additional slides, apparently, at the hospital, which were cut
24 at or about the same time as the original slides were, so we
25 have a situation where we could bring those slides in, which

1 are still in the custody of the hospital, therefore there
2 should not be a chain of custody issue raised, since that's
3 the normal business practice of the hospital to -- as it
4 relates to the slides.

5 THE COURT: Right.

6 MR. LEE: I think that even simplifies it even more so
7 than the description that Mr. Todd described. We will go to
8 that if we need to, if there is some issue that's raised as it
9 relates to the slides that are in the hospital's possession.

10 THE COURT: Well, Counsel, I'm going to let you all
11 work -- if you can agree on this among yourselves, rather than
12 the Court intervening, but it sounds clear to me that one --
13 by one method or the other you are going to be able to meet
14 your chain issues, however, this business of substituting
15 times, I always try to cooperate with the lawyers, and bring
16 the witnesses out of order.

17 What does the Plaintiff say to their request to bring
18 Mr. Proia -- Dr. Proia in on Thursday?

19 MR. FOSTER: Your Honor -- and I hate to be a stickler
20 about this, I really do, but now the -- you know, what we've
21 got here is we -- we've all known for months this was set for
22 May 17th, I mean, we knew that, so you know how hard it is,
23 being an ex-lawyer yourself ---

24 THE COURT: I do.

25 MR. FOSTER: ---How hard it is to schedule these

1 experts, and that's not only my experts, that's their experts,
2 and I'm not trying to be a stickler, but this is my case, and
3 we've got experts that are on tight time -- I mean, I've got
4 them coming from Vanderbilt, and from Boston, and from -- you
5 know, and they are on tight time schedules too, and we -- you
6 know, I mean, you know, it's down to the point now I think one
7 of them is wanting to be -- trying to -- he's got something
8 that afternoon, has to be in Charlotte, and he wants a -- it's
9 just crazy trying to get them here even, and ---

10 **THE COURT:** All right. Well, let's do -- Counsel, let
11 me break in. Let's do this. I'll either start early or stay
12 late and try to accommodate Counsel. I will caution the jury
13 that this witness is not part of your case, but is taken in an
14 effort to facilitate the overall presentation of all of the
15 evidence in the case.

16 I'm going to do my best to cooperate with the attorneys
17 on the Defendants' side when somehow if it happens -- and it
18 may yet happen while we are at lunch -- the same thing happens
19 to you and a witness calls and says, okay, now here is this
20 emergency, then we will do the same thing for you. All right.

21 **MR. FOSTER:** And I can appreciate that, Your Honor, but
22 I think they are also planning on calling family members on
23 Thursday too.

24 **MR. AIKEN:** Well, I was going to address that, if I
25 may, and I understand, Mr. Foster, why you would not want to

1 have out-of-order witnesses Wednesday and Thursday. I did not
2 know that Tom and Sandy were going to be here by today and be
3 available tomorrow. I can certainly, depending upon the
4 Court's pleasure and Mr. Foster's wishes, call all three
5 family members tomorrow, morning, noon or night, and I can
6 tell you, I'm not going to be long because I can't be long
7 based on the Court's ruling. I mean, we could get all -- if
8 Mr. Foster wants them tomorrow out of order I'm happy to make
9 them available.

10 **THE COURT:** Why don't we just let the Defendants go
11 first in this case. Y'all want to ---

12 **MR. AIKEN:** I had mentioned this, Your Honor. I had
13 mentioned this way back when, I think we had a conference
14 call, that I had a problem with the family being off more than
15 one week.

16 **THE COURT:** Okay.

17 **MR. AIKEN:** So my problem was made known early on.

18 **MR. FOSTER:** I mean, my feelings are kind of like
19 yours, Your Honor, I think I'm entitled to put my case up
20 without one day Plaintiff, one day Defendants, one day
21 Plaintiff, and then all Defense.

22 **THE COURT:** Well, let's do this. First, let me promise
23 you, I'm not going to call any witnesses and put them in your
24 case, all right, so that's one thing you worry about won't
25 happen. The second thing is, let's -- I'm going to let y'all

1 talk about this over lunch. Let me just consider over lunch.
2 I really believe the jury is going to have the ability to
3 synthesize all the evidence, and they are going to have a
4 great volume, and at the end it won't make any difference
5 whether someone was first or last, or came in the middle, this
6 or that, but let me think about it further, and then we will
7 come back with a bright idea after the lunch hour.

8 All right. Very good. We'll be in recess now --
9 remember, we are coming back at 1:30.

10 (THE FOLLOWING TAKES PLACE AFTER A LUNCH BREAK AND
11 OUTSIDE THE PRESENCE OF THE JURY.)

12 THE COURT: Please be seated, ladies and gentlemen.

13 MR. FOSTER: Your Honor, the Court Reporter said
14 there's a matter we need to take up with you before we start.

15 THE COURT: Okay.

16 MR. FOSTER: And if you don't mind, Judge, I just
17 wanted you to look at this just to make sure I'm -- I mean, we
18 all agree, but I want to make sure. It's your ruling ---

19 THE COURT: Sure.

20 MR. FOSTER: ---And I want to make sure that we don't
21 run afoul of your ruling. He takes out that ---

22 THE COURT: Yes.

23 MR. FOSTER: ---And he takes out that ---

24 THE COURT: Family services, right.

25 MR. FOSTER: ---And he takes out that?

1 **THE COURT:** That's right. Family services. Thank you.

2 **MR. FOSTER:** Okay. All right.

3 **THE COURT:** All right. Now, is there -- we were going
4 to discuss the evidence, I believe, Madame Court Reporter, and
5 let's make sure we state on the record what exhibits are in
6 and what are not. There was a little bit of confusion about
7 that earlier, and I think there may be some more that have
8 been added in, so I'll let the lawyers say what you believe is
9 in evidence by agreement at this time.

10 **MS. SCALISE:** Do you want me to just start?

11 **THE COURT:** Go ahead, Ms. Scalise.

12 **MS. SCALISE:** I believe Joint Exhibits -- Exhibit
13 Number 1 is the E.R. record dated January 26, 2002.

14 **MR. FOSTER:** That's agreed.

15 **MS. SCALISE:** Exhibit 2 is Grand Strand Regional E.R.
16 record and admission dated January 28, 2002.

17 **MR. FOSTER:** That's agreed.

18 **MS. SCALISE:** Exhibit Number 3 are the bills from Grand
19 Strand Regional Medical Center dated January 26, 2002, and
20 January 28, 2002.

21 **MR. FOSTER:** That's 3.

22 **MS. SCALISE:** Exhibit 4 is the Wal-Mart Pharmacy
23 record.

24 **MR. FOSTER:** Agreed.

25 **MS. SCALISE:** Exhibit Number 5 is Dr. Chomyn's record.

1 MR. FOSTER: Agreed.

2 MS. SCALISE: And there is no Exhibit 6.

3 MR. FOSTER: Agreed.

4 MS. SCALISE: Exhibit 7 is Cape Fear Urological record.

5 MR. FOSTER: Agreed.

6 MS. SCALISE: Exhibit 8 is Cape Fear Valley Health
7 System records.

8 MR. FOSTER: Agreed.

9 MS. SCALISE: Exhibit 9 are the funeral bills.

10 MR. FOSTER: Agreed.

11 MS. SCALISE: Exhibit 10 is a photograph of Kelly Fay.

12 MR. FOSTER: Agreed.

13 MS. SCALISE: Exhibit 11 is a letter from Sean ---

14 MR. TODD: Exhibit 10 the Plaintiff's Exhibit, rather
15 than Joint Exhibit?

16 MR. FOSTER: Yes, that's Plaintiff.

17 MS. SCALISE: Okay. That's going to be Plaintiff's
18 Exhibit 1.

19 MR. FOSTER: That will be fine. We start with the --
20 with the picture as 1.

21 MS. SCALISE: It's a Plaintiff's ---

22 MR. FOSTER: That's more confusing. Those are just
23 exhibits that were not allowed.

24 COURT REPORTER: Joint Exhibits are 1 through 9, and
25 Defendants' 1 through 10, with the exception of Number 6.

1 **MR. FOSTER:** I think -- did you just continue these
2 from ---

3 **MS. MAGEE:** Yes, I mean, I was just using exhibit
4 stickers and not Plaintiff and Defendants, so ----

5 **MS. SCALISE:** What we will do is, we'll say Plaintiff's
6 Exhibit Number 1 ---

7 **MR. FOSTER:** We'll remark it.

8 **MS. SCALISE:** Yes. Okay.

9 **MR. FOSTER:** All right. Let's remark this Plaintiff's
10 Number 1.

11 Apologize, Your Honor. We thought we had it done.

12 **THE COURT:** The jury is present.

13 **COURT REPORTER:** I thought this was suppose to be a
14 photograph, the next one, number -- Plaintiff's 1.

15 **MS. MAGEE:** We can do that.

16 **MR. FOSTER:** I'm sorry.

17 1, 2 -- I'm sorry. 3 are portions of his blog. Okay.

18 **MS. SCALISE:** Okay. So Plaintiff's Exhibit Number 1 is
19 a photograph, Plaintiff's Exhibit Number 2 is a Christmas
20 letter dated December 18, 2000, Plaintiff's Exhibit Number 3
21 are various emails and blogs, then on Defendant's Exhibit
22 Number 1 is the KUB done January 26, 2002.

23 **MR. FOSTER:** Agreed.

24 **MS. SCALISE:** Exhibit 2 is the CAT scan dated January
25 26, 2002 ---

1 **MR. FOSTER:** Agreed.

2 **MS. SCALISE:** ---Images 1 through 20, Exhibit 3 is CAT
3 scan dated January 26, 2002, images 21 through 40, Exhibit 4,
4 CAT scan dated January 26, 2002, images 41 through 60, Exhibit
5 5, CAT scan dated January 26, 2002, images 61 through 80,
6 Exhibit 6, CAT scan dated January 26, 2002, images 81 through
7 a hundred, Exhibit 7, CAT scan dated January 26, 2002, images
8 101 through 120, Exhibit 8, CAT scan dated January 26, 2002,
9 images 121 through 140 ---

10 **MR. FOSTER:** Agreed.

11 **MS. SCALISE:** ---Exhibit 9, CAT scan dated January 26,
12 2002, images 141 through 147, and then Exhibit 10 is a blog
13 from SeanFay.com, from January 27th, 2002, until February 28,
14 2002.

15 **MR. FOSTER:** Agreed.

16 **THE COURT:** All right, now, any objection from any
17 attorney, from any party, to what has just been entered into
18 the record?

19 **MR. TODD:** Is there a Plaintiff's Exhibit 3?

20 **MS. SCALISE:** Yes.

21 **MR. TODD:** That's -- I haven't seen that.

22 **MR. FOSTER:** Not from me, Your Honor, and I'm assuming
23 now that they are all marked, they are in evidence, we can use
24 any exhibit that's here.

25 **THE COURT:** Exactly. And you don't need to use a

1 foundation for them. They are in evidence and you may use
2 them as you wish.

3 **MR. FOSTER:** We can use Joint, Plaintiff, Defendants,
4 whatever. Thank you, Your Honor.

5 **THE COURT:** You may.

6 **MR. TODD:** Have you looked at these?

7 **THE COURT:** Counsel -- and my Court Reporter is
8 reminding us, for purposes of Appellate review, please make
9 sure when you pick up a document you use -- refer to the
10 number so there won't be a confusion there. All right.

11 All right, then let's bring in the jury please, Mr.
12 Nobles.

13 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
14 JURY.)

15 **THE COURT:** All right, ladies and gentlemen, welcome
16 back. I trust you had a nice lunch break, and you will recall
17 we've concluded the opening statements. We now move into the
18 Plaintiff's witnesses.

19 Mr. Foster, please call your first witness.

20 **MR. FOSTER:** Your Honor, may it please the Court, Your
21 Honor, the Plaintiff would call Mr. Sean Fay.

22 **THE COURT:** Please come forward and take the oath of a
23 witness.

24 **SEAN DOUGLAS FAY,** being first duly
25 sworn, testifies as follows:

1 DIRECT-EXAMINATION BY MR. FOSTER:

2 A. Sean Douglas Fay.

3 MR. FOSTER: Good afternoon, Sean.

4 A. Good afternoon.

5 Q. Sean, have you ever been on the witness stand before?

6 A. Yes, I have.

7 Q. And let me -- I apologize for doing this. We have a
8 small courtroom here so what I want you to do, I want you to
9 talk to the jury because I've talked to you before.

10 A. Okay.

11 Q. Okay. Regardless of the fact you've been in the
12 witness stand before, are you still a little nervous?

13 A. A little bit, yes.

14 Q. Okay. I would ask you to do this, Mr. Fay, if you
15 could at all possible -- I may wander around the room, but if
16 at all possible if you could direct all your answers to the
17 jury, they will be the ones that need to know the answers, I
18 would be most appreciative. Do you think you can do that?

19 A. I can do that.

20 Q. Okay. All right. Sean, the jury has heard brief
21 introductions of the parties, including you, and including
22 Kelly, and Defendants, but I'm sure they are a little curious
23 about your past, Kelly's past, who you are, where you grew up,
24 that type of thing, and would like to get to know you, so what
25 I would like to do is show you what's been marked as Exhibit

1 Number 1, that you saw me show this morning, and ask you if
2 you know who that is?

3 A. Yes, that's Kelly.

4 Q. Okay. All right. Would you do me a favor and
5 introduce Kelly to the jury? Would you -- as much as know
6 about her, starting from when she was young.

7 A. Kelly was born in West Allis, Wisconsin, a suburb of
8 Milwaukee, grew up in that area, Franklin, Greendale. At a
9 young age they moved to Indiana, I think just outside Goshen,
10 and then in -- later in Goshen for quite a while with their
11 stepfather. They took a job there.

12 As Kelly got older, say roughly sophomore, junior in
13 high school they moved to Aurora, Illinois, which is where I'm
14 from, and then that's where I ended up meeting Kelly at.

15 Q. All right, now, could you introduce yourself a little
16 bit for the jury, tell them a little bit about you growing up.

17 A. I grew -- born in Boston, about four or five my parents
18 divorced and we moved to Aurora, my mother and I, and in
19 Aurora that's kind of where I grew up pretty much my whole
20 life. I graduated high school, I joined the Army, I did two
21 years in Germany, two years back at Fort Bragg. That's how I
22 got to North Carolina. And in the midst of that that's how I
23 met Kelly, coming from Germany to Fort Bragg on military
24 leave.

25 And then after that I became a police officer. When we

1 first down I was a security officer then a police officer for
2 Methodist College in Fayetteville, and then with Hope Mills,
3 the town of Hope Mills, and then got into computers.

4 I've always kind of been interested in computers,
5 started doing web design, and then worked as a web master,
6 corporate web master, and then I relocated to Myrtle Beach as
7 a corporate web master, and then after that I got back into
8 policing, and then kind of -- what I liked to do, so I've been
9 employed as a police officer since 2004 with Myrtle Beach.

10 Q. Not bad. Sean, go back for me, if you would, and
11 please tell this jury how your romance with Kelly started, how
12 it came about, and slow down. You've got all the time you
13 need.

14 A. Sure.

15 Q. Okay. I want them to understand y'all's relationship,
16 how you met her, where you met her, how your relationship
17 progressed, and then we'll talk about where you moved, things
18 like that.

19 A. It started kind of just -- I guess as most relationship
20 do, kind of on a fluke thing. I had actually cracked a tooth
21 on a chewy sweet tart, and had to get my tooth worked on, and
22 I was having some problems so I ended up staying in town with
23 a friend of mine near where the dentist that I used to have
24 growing up was. Of course this is in the time I'm still in
25 the military, and while we were there that night my friend

1 took me to the movies and that's where I met Kelly. She was
2 an assistant manager at the movie theater, and he had worked
3 at the movie theater, and Kelly and I kind of talked, and I
4 thought she was really pretty, and we just kind of talked from
5 there, and after the movie was over we met again that night,
6 talked some more, and then over that kind of twenty-eight,
7 thirty day period that I was in town that's where we kind of
8 started dating, and then from there our relationship grew to -
9 --

10 Q. How old -- let me interrupt you. How old was Kelly at
11 the time?

12 A. Kelly was seventeen when we met.

13 Q. Was she still in high school?

14 A. Yes, she was.

15 Q. Okay. Go ahead.

16 A. So I was -- I transferred down to Fort Bragg. Kelly
17 and I kind of had a long distance relationship. She would
18 come see me, or I would go see her, kind of a little bit of
19 both. She was going to Avanza Valley High School, a high
20 school near the high school I went to, East High, and went up
21 for her graduation. When she graduated I was there for the
22 graduation, and then Kelly ended up going to school. She
23 wanted to go to college. She went to Northern Illinois
24 University for a year, I believe it was a year. She might
25 have went to college at -- I'm kind of confused on that.

1 And I deployed to Haiti. I was in Haiti for six months
2 toward the end of my getting out of the Army, so I didn't see
3 her for a period of about eight months. We still kept in
4 contact. She wrote lots of letters. And then when I got back
5 from Haiti, probably January or February of '95, that's when I
6 was here, stateside, in Fayetteville, in Fort Bragg, and we
7 got engaged, and then were married that year when I got out of
8 the Army, June 17th of '95.

9 Q. '95?

10 A. Yes.

11 Q. Where did y'all get married?

12 A. We got married in Aurora at her parents' house.

13 Q. Okay. In Illinois?

14 A. Yes, in Aurora, yes, Aurora, Illinois. Sorry.

15 Q. Okay. And where did you live immediately after you got
16 married?

17 A. Immediately after we moved to Fayetteville. That's
18 where I had a job, and I was working at the college as a
19 security supervisor. They had police and security at the
20 time, so I had just gotten out of the military. I was working
21 part-time when I was in the military, so I would have my full-
22 time military job and then part-time as a security officer,
23 and then they offered me a full-time position right after I
24 got out, so we moved right down here.

25 Q. What was Kelly doing?

1 A. Kelly at the time -- when she moved down her very first
2 job was working in a check-cashing place, but I didn't feel
3 real safe or secure having her there, because people are
4 coming in, and they are moving money, and she would be there
5 alone, and it just kind of made me nervous, so she got out of
6 that. I think the next job she took was at the hotel, if I'm
7 not mistaken, I believe the Hampton Inn in Fayetteville.
8 There was a new one opening so she actually kind of helped
9 clean the property and do a lot of stuff before they opened,
10 because they weren't ready, so she started working maybe two
11 or three months before they opened, and then that's -- and
12 then that was it. She kind of took off from there and did
13 well.

14 Q. Okay. And now what brought y'all to Myrtle Beach?

15 A. In the midst of, you know life, I got into computers
16 and got into web designing, and just, you know, web master,
17 and one day I'm in a vehicle pursuit and the guy jumps and
18 runs and swims off in a creek on me, and as I'm sitting there
19 waiting to tow the vehicle the want ads are kind of falling
20 open and I'm there and, you know, pretty much everything is
21 over, and I looked and there was a job ad for a web master at
22 the place I worked Cape Fear Valley, and my partner was like,
23 man, you should really apply to that, you know, it's -- we
24 weren't making a lot in policing at the time. I think it was
25 like Twenty-One Thousand, and he was like, this is a great

1 paying job and soon I got into computers, doing web design
2 work for them.

3 And a friend of mine I had met through the internet
4 worked down here in Myrtle Beach. He's from here, and he
5 worked for Legends Resorts, and they were looking for a web
6 master, and he knew I had been doing it for two or three years
7 for Cape Fear and he offered me ---

8 Q. What's his name?

9 A. Chad Casselman. And he offered me to job. He was kind
10 of my supervisor, so he offered me the job, and then I went to
11 become a web master for Legends Resorts, which at the time
12 owned Sands Resorts as well, and that's kind of how we got
13 relocated here in Myrtle Beach.

14 Q. Okay. And when Kelly got to Myrtle Beach where did she
15 go to work?

16 A. Initially she was looking to be a -- I commuted for a
17 few months. I would drive home on Friday and then come back
18 Sunday, and I stayed on property at Legends. But initially
19 she was trying to do computer consulting, but the market was
20 turning tough. That was around September 11th, so she ended
21 up getting into hotels, because she had experience in hotel
22 management, and she didn't know if we -- she wanted to travel
23 and us be apart so much, because there would be just so much
24 traveling doing the consulting work.

25 So she got back into hotel management. A firm had kind

1 of sought after her to manage one of the hotels, to be an
2 assistant general manager, and they just -- didn't search
3 after her. After she kind of didn't seem so interested they
4 still came back, and came back again, and they seemed kind of
5 dead set on they wanted Kelly as their one -- the person they
6 wanted to hire so she ended up working for the Hampton Inn and
7 Suites on South Ocean in Myrtle Beach.

8 Q. And who owned that hotel and hired her?

9 A. Buddy Lindsey was the owner of the hotel, and the firm
10 that hired her was, I think -- Strand Development Corporation
11 had found her, and they had hired her, John Farr, actually,
12 and he was the one who kind of tracked Kelly down. But she
13 obviously got to know the owner of the hotel, Buddy Lindsey,
14 and in the short time that Kelly was there he actually was
15 letting the management firm go because he didn't need them.
16 He had Kelly as the A.G.M., she ran the operations of the
17 hotel, and then the General Manager, Tom Moore, was kind of
18 the -- the hands on person for the guests, because I guess as
19 the guests they want to talk to the head person, but Kelly ran
20 the day to day operations. And so Buddy, I guess, had let the
21 company go, and then hired Tom, and Kelly kind of direct to
22 work for him.

23 Q. Did you ever have occasion to find out -- besides
24 talking to Kelly, did you ever have occasion to find out how
25 she was doing in her job, whether she was doing a bad job, or

1 a good job?

2 A. She came home always excited about it, as far as what
3 she would hear, what they would tell her, what Buddy would
4 tell her, and I think the biggest thing is when they had a
5 management company managing the hotel, as far as the staffing,
6 and then firing the staff as far as -- because Kelly was hired
7 with Tom, and I think that says volumes right there, they
8 didn't need the management company.

9 And then too, at a Christmas party, Buddy Lindsey -- I
10 was at the table with him and he came to me and ---

11 MS. SCALISE: Your Honor, objection, on the basis of
12 hearsay.

13 THE COURT: All right. I'm going to sustain that,
14 Counsel. Hearsay.

15 Please move to your next question.

16 Q. Just tell me what you know personally, instead of what
17 somebody told you.

18 A. What I know personally, that's hard not trying to step
19 on that one.

20 Q. Did you ever learn how she was doing in her job?

21 A. They -- the goal was to open a new hotel for Kelly to
22 take over as the manager of the new hotel, right next to the
23 other hotel, so that was always what was talked about in the
24 works from, you know, direct to me to everybody. I understood
25 it and from Kelly then saying it.

1 Q. So would Buddy Lindsey be a better person to ask since
2 he's the one that owned the hotel, about that?

3 A. Yes. He was the owner, it was his plan, so whatever he
4 was going to do, I mean, it always involved Kelly.

5 Q. Okay. I'll leave you alone about that now. Okay.

6 A. Thank you.

7 Q. Did y'all -- let me ask you this. Before we get into
8 some other things, Sean, did y'all have any children at the
9 time of Kelly's death?

10 A. No, not at the time, no.

11 Q. Were you planning on having children?

12 A. Eventually. We had, I think, kind of a little ways to
13 go. We were wanting to get set in our careers, but we had
14 talked about it. It just wasn't a forefront issue for us, but
15 it was always assumed between us that we were going to have
16 children.

17 Kelly was a natural around kids, and I was real nervous
18 on babies, but seemed to do better about kids older, so I mean
19 it was getting to that point, but we were going to wait a
20 little longer in our careers.

21 Q. How did Kelly feel about children?

22 A. I'm sorry.

23 Q. How did Kelly feel about children in general?

24 A. She loved them. When she met my niece -- she kind of
25 shared the middle name -- she was great. She was always good

1 around kids. Kelly was quite a bubbly person. When she came
2 into the room she was always kind of the light in the room,
3 the beaming person, so she loved kids.

4 Q. I want to take you up, Sean -- I'm going to bring the
5 jury up, okay, to the night before, on January 25th, 2002, the
6 night before you took her to the Emergency Room at South
7 Strand with a kidney stone. Do you recall that night?

8 A. Yes, I do.

9 Q. All right. Would you please tell the jury what
10 transpired that night, and if you ---

11 A. The night before Kelly and I had planned on watching a
12 movie, and she had cooked dinner and planned on watching a
13 movie, and she got a phone call from work saying that
14 everybody was quite distraught, guests were.

15 MS. SCALISE: Your Honor, objection, hearsay.

16 THE COURT: All right. Let me ---

17 MR. FOSTER: Don't say what anybody said.

18 THE COURT: Well, Mr. Foster, just a moment. Let me
19 talk to the jury about this a moment, because we'll have some
20 objections in the course of the trial, and this objection
21 happens to be hearsay.

22 I think we probably all played a game when we were
23 children where you sit in a circle and someone whispers
24 something and it goes back around, and by the time it gets to
25 the other end of the circle it's completely changed.

1 The hearsay rule prevents -- and it has exceptions to
2 it, and we'll get into that at some point, I'm sure, but it
3 prevents someone from coming in and saying what someone else
4 said. The best evidence of that, of course, would be bringing
5 this other person in, whoever it was that said something, and
6 let them say what they said, just to avoid confusion.

7 And that's the reason I sustain the objection, and
8 please move to your next question.

9 Thank you.

10 Q. Let me ask you this, Sean, you saw Kelly Friday night,
11 you were with her, weren't you?

12 A. Yes.

13 Q. Was she suffering any ill effects or any health
14 problems that you knew of or she knew of?

15 A. Not Friday night, no.

16 Q. Did she voice any complaints to you about feeling bad
17 at all, or anything?

18 A. No, she didn't.

19 Q. All right. Now, if you could move us, and bring the
20 jury up to January 26, on Saturday morning, 2002, if you would
21 please describe that.

22 A. Kelly woke me up about 7:30 Saturday morning, in lots
23 of pain. She had the pain before. The first time she had the
24 pain it was excruciating for her, I mean, it was -- she was
25 screaming hysterically the first time, a year prior, so I

1 think this time she might have known kind of what it was,
2 because it was a very similar pain, but she was obviously in a
3 lot of pain, and she felt it was in the same area. It was
4 her, you know, lower right -- they keep saying flank,
5 whatever, it's the lower right stomach area for a normal
6 person, I would say -- and she thought and felt it was her
7 kidney stone again, or another kidney stone.

8 Q. Can I ask you this since you mentioned that. Can you
9 back up and tell the jury about the first kidney stone visit
10 she had in North Carolina, and what -- what year it was.

11 A. I don't a hundred percent of the specifics. It had
12 been approximately a year prior that she had the kidney stone,
13 and when she had it that pain seemed, you know, like a ten out
14 of ten on a scale, the way she was upset so bad, crying, kind
15 of screaming with it in the car. I remember the car ride,
16 just being how torturous it was for her because it seemed to
17 be such a far ride to the hospital. And then we went to the
18 hospital, she received the normal treatment, but at that time
19 she felt she had already passed the stone, and that's kind
20 of -- that's kind of ---

21 Q. And you said she had already passed it when you got
22 there, they thought?

23 A. Correct. Yes, they -- we went through everything, and
24 all the treatment, and the end result was, they didn't find
25 the stone, believed she had had one but she had already passed

1 it prior to getting to the hospital.

2 Q. Okay. Do you remember the size of that stone by any
3 chance, or what -- scratch that question. Don't worry about
4 that, Sean.

5 Bring us on up to Saturday in January, 2002.

6 A. So Saturday morning, on the 26th, she woke me up around
7 7:30, kind of screaming, just -- I don't know how to describe
8 it, not actually screaming as bad as the first time, but she's
9 in a lot of pain, a lot of discomfort, I mean, that would
10 probably be putting it mildly, but she was just in a lot of
11 pain, very hurt.

12 We lived around the corner from South Strand and we got
13 dressed -- she got dressed, I got dressed, and then we went to
14 South Strand Ambulatory Care, and we were there probably about
15 eight o'clock. It's about ten minutes from the house.

16 Q. All right. You were there at eight?

17 A. Yes, approximately.

18 Q. Let me ask you, have you ever seen this? You have seen
19 this E.D. for encounter, have you not?

20 A. Yes, I have.

21 Q. This is the handwritten sheet from the first visit at
22 the hospital?

23 A. Yes. Yes.

24 Q. I want to ask you a couple of things that don't involve
25 medical opinions, Sean, but just factual things, okay ---

1 A. Okay.

2 Q. ---And ask you if it comports with your recollection.

3 A. Okay.

4 Q. All right. How about the date, 1/26/02, does that --
5 in that in your recollection, that's the right date?

6 A. Yes, it is.

7 Q. Okay. Time of arrival, eight o'clock, does that
8 comport with your recollection?

9 A. Yes, it does.

10 Q. All right. Now, as far as the chief complaint and the
11 onset, complaint of flank pain one-half hour ago, emesis times
12 one, and diarrhea times one. Do you remember whether or not
13 she threw up one time that morning, and had diarrhea one time
14 that morning?

15 A. I don't remember, and it might have been before I woke
16 up or she woke me up, so it's possible, but I don't -- I don't
17 off-hand remember that she did.

18 Q. Okay. And when she was seeing the triage nurse what
19 were you doing?

20 A. I was checking her in. When we got to South Strand,
21 being, you know, January at the beach here, there wasn't
22 anybody there. They kind of took me right at the insurance or
23 check-in window, and they kind of -- I mean, within a minute
24 or less, it seemed like, they had moved her off through the
25 double doors into the E.R. area.

1 Q. Okay. So, was it more quickly than you expected?

2 A. It was, definitely more quickly than I expected.

3 Q. Any complaint?

4 A. Not with that, no. It was -- I mean, when you get
5 there you don't want to wait three hours, but it was just nice
6 that we went quick.

7 Q. Okay. Let me ask you this, do you see -- do you see
8 this where it says crying. Do you recall her crying in pain?

9 A. Yes.

10 Q. All right. And do you recall at some time -- at some
11 point in time that they took her to x-ray?

12 A. Yes, yes. I do recall that.

13 Q. Did you ever have a conversation with the doctor about
14 her x-ray?

15 A. Yes, I did.

16 Q. Okay. We'll get to that in a second.

17 Now, as far as them taking her temperature at the
18 hospital, were you ever present when they took her
19 temperature?

20 A. No, I was not.

21 Q. So when they took this temperature that indicates
22 ninety-eight point one you were not there?

23 A. Correct. I was not in the room.

24 Q. Okay. All right. And tell me, just from your
25 recollection, what happened next. I'm backing you up to

1 triage, after she comes in. Don't go to the record. I want
2 to know what you recall, because you are not a doctor.

3 A. After I had checked her in through the insurance,
4 through the normal check-in they took me to the back with her,
5 and at that time I was entering the room with Dr. Law,
6 together. I guess -- apparently he had already tried to walk
7 in on her but she was changing. They were putting her into a
8 gown. And then we walked in together, whereas she started
9 telling her symptoms.

10 Q. All right. Were you there when she was taken to x-ray?

11 A. I was there when she was taken to x-ray, correct. I
12 was not there when she got the x-ray.

13 Q. All right. So you weren't around then?

14 A. Correct. I was not around then.

15 Q. I want to show you what's been marked as Defendant's
16 Exhibit Number 1, an x-ray. Do you recall if you ever saw
17 that at the hospital.

18 A. Yes, I did.

19 Q. And tell me -- tell us what Dr. Law said to you when
20 they showed you that x-ray.

21 A. When he came in the room and he showed us the x-ray his
22 quote was, congratulations, it's a kidney stone.

23 Q. All right. And let me ask you this, was that "al"
24 written on there, and the kidney stone circled, point, was
25 that on there?

1 A. Yes, it was. Yes.

2 Q. All right, now, did they also -- all right, what
3 happened next, as far as after the x-ray, when he came in and
4 told you about the kidney stone?

5 A. After the kidney stone he wanted to do -- after the x-
6 ray -- excuse me -- he wanted to do a urinalysis, or whatever
7 it was, but Kelly had just finished her menstrual cycle, and
8 didn't want me to be in the room, so she asked me to step out,
9 and the nurse that was taking care of her, they were in the
10 room alone, and then proceeded to do a urinalysis, I guess, a
11 catheterization to get the urine, and I was waiting outside of
12 the room when that happened.

13 Q. Sean, had you ever heard, in your whole life, that a
14 fever and a kidney stone was an emergency?

15 A. No, not till other testimony that we heard later in the
16 years, but I didn't know.

17 Q. Have you ever -- had you, at that time, ever heard that
18 a kidney stone and an infection was an emer -- a urinary tract
19 infection was an emergency?

20 A. No.

21 Q. All right. Do you recall whether or not she was ever
22 sent to CT for a CT scan?

23 A. Yes, she was. After the urinalysis came back Dr. Law
24 came in and had said that -- he said it just seemed odd, it
25 came back very clean, there's no bacteria, no blood, it came

1 back too clean, it seemed a little odd to him, and then that's
2 when he wanted to do a CT scan, or -- I wasn't certain at the
3 time if it was a CT, an MRI, if that's the same thing, I
4 wasn't certain, but that's what the next thing was, and the
5 next step.

6 Q. Were you with Kelly when they took her to CT?

7 A. I was with her when they took her, but they took her
8 out of the room and I stayed in the room.

9 Q. All right. And were you still there when she came
10 back?

11 A. Yes, I was.

12 Q. All right. What happened then?

13 A. In between -- in between the time that this had
14 happened -- and it's kind of -- obviously eight years ago, so
15 it's a little foggy to remember the time lines, per se. In
16 between then, after the x-ray and the urinalysis, somewhere in
17 between that part to the CT scan the nurse came in and gave
18 her the medicine, the pain medicine, because she was still in
19 some pain, and at the time she had taken two vials of blood,
20 and the nurse had told us, she said, the doctor didn't order
21 these yet, but it's typical that he does, do you mind, and
22 Kelly was like, no, go ahead.

23 And I guess the goal was to not restick twice, or
24 multiple times, so he took two vials of blood, put Kelly's
25 name on them, and then had put those on the counter. And then

1 shortly thereafter is when Kelly was taken to get her CT scan,
2 and then she came back.

3 Q. Did those two vials of blood ever -- did they ever move
4 from that room?

5 A. They didn't. In fact, when we initially -- or finally
6 were discharged we had walked out of the room, Kelly walked
7 back in the room because she didn't want her blood there, and
8 she took her blood and she handed them to the nurse at the
9 station, who gave her a doctor's note, and just said, hey, I
10 don't want to leave my blood in the room, so here, and the
11 girl said, okay, thanks, we'll take care of it, and that was
12 it for the blood.

13 Q. Okay. All right. Now, did -- at any time during the
14 period you are talking about did Dr. Law ever come in and talk
15 to you, other than the time when he came in and talked to you
16 about the x-ray?

17 A. He did. He -- he was back and forth once or twice, and
18 he had mentioned that he had talked to Dr. Young, the
19 urologist on call, who had said that they both agreed that
20 based on Kelly's health, being you, healthy, and her pain
21 management, that she would be okay till Monday to release her
22 and follow up with the urologist on Monday.

23 And he kind of gave me the impression that he had talked
24 to him more than once, so between the x-ray and the urinalysis
25 to after the CAT scan, or CT scan, sorry. I don't know if

1 that's the same.

2 Q. All right. But is that a specific recollection you
3 have, that he said that both he and Dr. Young agreed ---

4 A. Yes. Specifically he told me -- yes, he said that he
5 and Dr. Young agreed, based on her age, her health, and that
6 they could deal with the pain management, that she would be
7 okay to release, and -- the most -- the biggest concern was
8 her pain, if they could control her pain -- I don't know what
9 to assume, but if they could control her pain she could wait
10 till Monday. That was the gist of the conversation. But yes,
11 he did say they both agreed.

12 Q. Sean, have you ever had any medical training? Are you
13 a doctor or a nurse, paramedic?

14 A. No, CPR, and first responder, you know, basically just
15 to make sure they don't hurt themselves while EMS responds.

16 Q. Okay. Did you feel like you were in a position to tell
17 the doctors or nurses what they ought to be doing for a kidney
18 stone?

19 A. No, I had no idea, and you know, you hear of people
20 with kidney stones so often, and they make a lot of people --
21 while it hurts they just make it off as, it's just a kidney
22 stone. I had never heard of anything -- somebody dying from a
23 kidney stone before. I didn't know it was possible. I just
24 thought they were really painful but something you got
25 through.

1 Q. You never talked to Dr. Young on the phone, personally,
2 did you?

3 A. No, never.

4 Q. Okay. But did you hear Dr. Law talking the him?

5 A. I recall him -- a conversation. We were actually in a
6 private room, the door was open, and I recall him at the work
7 station behind, on the phone, and I believe -- the inference
8 was that he was talking to Dr. Young. That's what I thought.

9 MS. SCALISE: Your Honor, objection, speculation.

10 THE COURT: Overruled.

11 MR. FOSTER: Thank you, Your Honor.

12 Continue.

13 A. I believed he was talking to him about the case because
14 I heard elements of the case, of Kelly's, you know, case,
15 being talked about, but obviously I couldn't hear the other
16 side of the conversation.

17 Q. Let me ask you this -- and I know throughout the course
18 of this litigation you have seen this record before, the
19 typewritten E.R. notes from Dr. Law, is that correct?

20 A. Yes sir, I have.

21 Q. All right. Let me ask you some of the same questions,
22 if you would, please, about the E.R. report in distinction to
23 the handwritten report, okay.

24 A. Okay.

25 Q. All right, South Strand -- that's you recollection?

1 A. Yes. Correct.

2 Q. All right. Date of service, 1/26/2001, is that
3 correct?

4 A. No. It would be 1/26/2002.

5 Q. Okay. Now, Kelly's chief complaint was abdominal pain,
6 and back pain. Is that the way you recall it?

7 A. Yes, I mean, that would be it, yes.

8 Q. Okay. Now, the history he's written here says, a
9 twenty-five year old female with sudden onset of right flank
10 pain beginning approximately one and a half hours prior to
11 arrival. Is that your recollection, or was it a half an hour?

12 A. That was a half an hour prior to arrival. She woke me
13 up at 7:30, we were there at eight, so one and a half hours
14 would be ---

15 Q. All right, he's written on here she does complain of
16 some mild nausea but no vomiting. Is that different than what
17 you recall as to the handwritten note?

18 A. Again, I noticed her vomit so I don't -- I don't
19 remember ever seeing her vomit -- and then, if says it there -
20 - but the -- I guess the handwritten note did say she vomited.

21 Q. Okay. All right, her past medical history significant
22 for kidney stones and depression. Does that match your
23 recollection?

24 A. Yes.

25 Q. I'm sorry, if I'm blocking ya'll this is ---

1 All right, where it says, because the patient is in
2 severe pain, with the lack of blood in the urine, she did have
3 a CT scan performed to rule out the possibility of
4 hydroureter. I'm asking you about hydroureter cause that's a
5 medical term, but do you recall what Dr. Law told you why she
6 was getting a CT scan?

7 A. He said because he thought it was odd that there was no
8 blood or bacteria in the urine and, of course as a layman I
9 hadn't -- I wasn't certain of what the urine should have
10 looked like or been like, and the only thing I could think of
11 was maybe it's the catheterization because it came from -- I
12 don't know -- but, yeah, he did mention that.

13 Q. Now it also says that -- that Kelly got fairly good
14 pain relief with -- after -- not after the Toradol but after
15 the Dilaudid, the IV Dilaudid. Would you agree with that?

16 A. Yeah, she felt much better after that.

17 Q. And then we come to the consult area. Have you seen
18 that before?

19 A. Yes, I have.

20 Q. All right, and you didn't actually hear the
21 conversation between Dr. Law and Dr. Young, did you?

22 A. Correct. No, I did not.

23 Q. Okay, so you can't -- you don't know -- you can't
24 testify as to that, can you?

25 A. No. I can testify what he told me ---

1 Q. All right --

2 A. --- but not to --

3 Q. I'm going to that. All right, right here he wrote on
4 here, I did explain to the patient, however, that if her --
5 that if her pain becomes out of control, or if she has
6 increasing nausea, vomiting, any fevers or chills, that she is
7 to return to the E.R. Department immediately. Now tell me
8 what you recall about that conversation, if anything?

9 A. The conversation that we had was that -- based on --
10 both Dr. Young and I agree that based on her -- her age, her
11 health, and the pain management, that she's, you know, okay to
12 follow up on Monday. The thing that he was concerned with,
13 and when we were leaving was, you know, don't wait a week,
14 don't wait two weeks, this is important, because if not the
15 kidney stone could cause a problem, it's a larger stone she's
16 probably going to need, you know, lithotripsy, but don't wait
17 long because there could be complications, and that you need
18 to call on Monday, but any of that -- he never said any of
19 that. His thing was pain management.

20 Q. All right, what did he -- did Dr. Law say -- what did
21 he say to you, if anything, about whether he thought the stone
22 was likely to pass on its own?

23 A. Yes, he was saying just because of the size and shape
24 of the stone that she's probably going to need lithotripsy and
25 she probably will not be able to pass it on her own, and that

1 she would just have to follow up with the urologist for that.

2 Q. Okay, now you do see, do you not, Sean, where it says,
3 I do explain to the patient; do you see that?

4 A. Yes.

5 Q. Do you recall Dr. Law -- to the best of your knowledge,
6 do you recall Dr. Law ever speaking to Kelly when you were not
7 there?

8 A. I wouldn't know if he spoke to her when I wasn't there,
9 but when I was there, and she was there, he never said that.
10 The only -- I wouldn't know.

11 Q. Was there ever any -- any indication to you that there
12 had been a conversation in your absence about what to do or
13 anything like that?

14 A. No.

15 Q. All right. Sean, did you have these records when you -
16 - did you have these particular records, these typewritten
17 note -- did you or Kelly have a copy of your medical record
18 when you went home that day?

19 A. No, we did not.

20 Q. All right, now, now what I'm going to show you is the
21 second page of nurse's notes, and I want to ask you again, did
22 you ever see anybody -- do you see the column on here for
23 temperature?

24 A. Yes, I do.

25 Q. Did you ever see anybody take her temperature at the

1 hospital the whole time Kelly was there?

2 A. The whole time, I didn't see anybody take her
3 temperature.

4 Q. Even the one on triage where she was 98.1?

5 A. Correct.

6 Q. All right, do you dispute that?

7 A. No, I do not. That's -- I would say -- she was back in
8 the back with triage when I was checking her in with the
9 insurance.

10 Q. All right, and the last nurse's note says, among other
11 things, that EPIC med discharge instructions reviewed; do you
12 recall that?

13 A. I recall the nurse giving us the discharge instructions
14 and Kelly signing them, and then I recall us giving the blood
15 to the nurse at the station, and then at the station when the
16 nurse wrote Kelly a note, a work note, to be out of work for a
17 day or two.

18 Q. Before you left the hospital, Sean ---

19 A. Yes.

20 Q. ---Were you with Kelly when she signed this document?

21 A. Yes, I was.

22 Q. Do you recall that document?

23 A. Yes, I do.

24 Q. Okay, now what did they tell you to do? Did they tell
25 you to follow up with a urologist or did they tell you to

1 follow up with Dr. Young?

2 A. They told us to follow up with Dr. Young on Monday, he
3 was aware of the case, call at 8:30, and Dr. Law did say, you
4 know, call at 8:30, you need to call on Monday, and it's
5 important not to let this go out, you need to call Dr. Young
6 cause he's aware of the case.

7 Q. All right, on these -- and you had these records at
8 home; did you not?

9 A. Yes, correct, the discharge instructions.

10 Q. All right, and they gave you his phone number ---

11 A. Uh-huh.

12 Q. ---To call on Monday?

13 A. Correct.

14 Q. All right, now, do you recall what it said? Is this
15 your recollection of the -- well forget that -- the document
16 speaks for itself -- but did you ever read this where it says,
17 if you do not continue to improve or your condition worsens
18 please call -- please call your doctor or the emergency room
19 right away so you can be examined?

20 A. I did read them on Sunday, yes.

21 Q. Okay. Did Kelly have a regular doctor here in Myrtle
22 Beach yet?

23 A. No, she did not.

24 Q. Bear with me for a second

25 Were those the only discharge instructions you got?

1 A. I think there was three sheets total but out of the
2 three sheets, yes, I don't recall any --

3 MR. FOSTER: And For the record, Your Honor, we're
4 referring to blow-ups of Exhibit Number 1.

5 THE COURT: Very good. And, Mr. Foster, let me speak
6 beyond you to the jury. Ladies and gentlemen, of course in
7 any courtroom there's a lot of paper that flows back and forth
8 and around. We are very careful to determine what is an
9 exhibit and what is not, because when you retire to deliberate
10 at the end of the case, whatever is marked as an exhibit goes
11 with you back into the -- into deliberations, whatever is not
12 does not.

13 Please proceed.

14 MR. FOSTER: Thank you, Your Honor.

15 Q. Sean, did you have these discharge instructions when
16 you went home?

17 A. Yes, we did.

18 Q. And these are the ones that Kelly was required to sign
19 for ---

20 A. Yes, correct.

21 Q. --- pretty much?

22 A. Yes.

23 Q. Okay, now do you need to step down here to see this?

24 A. I can see these from here.

25 Q. Can you read it from there?

1 A. Yes.

2 Q. All right, would you, please read what I've highlighted
3 right here?

4 A. The phone number, 843-839-1000, instructions for Fay
5 Kelly. Please call us if you have any questions about your
6 medical problem. We're here to serve you.

7 Q. Please call them?

8 A. Yes.

9 Q. All right. Next under -- what does it say under kidney
10 stone?

11 A. Kidney stones. Your exam shows you have a kidney
12 stone. They also result from your PD -- urinary tract or
13 urinary infection. There's usually a great deal of pain when
14 a stone pass from the kidney down to the tubes, urethra or to
15 the bladder, kidney stones that block your urethra completely
16 can cause permanent damage.

17 Q. Is ureter or urethra?

18 A. Ureter, sorry, ureter ---

19 Q. Okay.

20 A. ---Completely can cause damage -- permanent damage to
21 the kidney. Surgery or lithotripsy is necessary sometimes for
22 larger stones.

23 Q. All right, and among other things, what does it say
24 down here after it tells you about half the kidneys who --
25 half the patients who pass one kidney stone will have a second

1 episode; was that true with Kelly?

2 A. Yeah, exactly.

3 Q. Did it tell you what to, what to avoid, and that type
4 of thing?

5 A. Yes.

6 Q. All right, and then the very last sentence under the
7 specific section for kidney stones says what?

8 A. Call or go to the emergency room right away if you
9 develop fever, more intense pain, or repeated vomiting.

10 Q. Okay, call or go to the emergency room. Was that what
11 you -- was that what you understood, and is that what you
12 read?

13 A. Yes, once -- when I read it, yes.

14 Q. If what happens?

15 A. If you develop fever, more intense pain, or repeated
16 vomiting.

17 Q. Okay, now I believe -- what was -- all right, let me go
18 forward then I'm going to bring you back, okay?

19 A. Okay.

20 Q. After she signed these discharge instructions were you
21 given anything else from the hospital, prescription or
22 anything else like that?

23 A. Yeah, prescription for pain medicine.

24 Q. All right, and so what did ya'll do then?

25 A. As we left the hospital I drove to Wal-Mart ---

1 Q. Before you get in the car -- I want to ask you a
2 question?

3 A. I'm sorry.

4 Q. What did Kelly look like on the way to the car ---

5 A. The last ---

6 Q. ---And in the car?

7 A. Yeah, the last portion there, as we were about to leave
8 the hospital, she was a little flush, a little red, she looked
9 a little warm. We got -- you know, we went out to the car,
10 she looked a little flush in the car. We drove to Wal-Mart,
11 from south strand to Wal-Mart on 501, and she waited in the
12 car. I went ahead, went in, dropped off the prescription and
13 just kind of dropped it off and went right back to the car,
14 got back in the car, drove her home -- we live on the Air
15 Force Base so it wasn't a far drive -- got her back into the
16 house, got her settled, then I drove back to pick up the
17 prescription from Wal-Mart, and then drove back home again.

18 Q. Okay, and when you got her home -- how long did it take
19 you to do all that before you got back home?

20 A. It took me about 45 minutes-ish, so maybe forty to
21 fifty minutes, probably closer to forty-five to fifty minutes.

22 Q. Okay, can you swear down to thirty seconds or minute
23 how long it took you?

24 A. Not down to the thirty seconds or minute, but it was --
25 the fortunate part was, it was a Saturday in January so there

1 wasn't like a lot of people here so traffic was very light on
2 the roads, and I literally just went into Wal-Mart, dropped
3 the prescription off cause she's waiting in the car and she
4 was uncomfortable and, you know, she didn't want to be sitting
5 in the car, so I wanted to take her home, so it was a quick
6 process for me. I was concerned to get back.

7 Q. Okay, let me ask you this, too, Sean. When you were at
8 the hospital did any -- did Dr. Law, or did any nurse at the
9 hospital ever tell you look -- look, your wife has a kidney
10 stone and if she develops a fever that's -- that's an
11 emergency, you got to get back here now; did they ever tell
12 you anything like that?

13 A. No, never not once. The goal was she -- her pain was
14 okay, she's fine, follow up. The only thing he stressed was,
15 don't let this go on a week, two weeks, because it's
16 important, she needs to get it checked out, you need to follow
17 up with urologist. That's the only thing he ever said. If he
18 had said fever at one time it would have been -- you know,
19 that this is an emergency, that would have been an obvious
20 clue, but he never said that.

21 Q. Okay, did anybody ever stress to you the fact that
22 fever and a kidney stone could cause Kelly to die?

23 A. No, not once, not ever.

24 Q. Was any urgency ever impressed upon you in any way
25 about -- I understand what they say, but was any sense of

1 urgency ever impressed upon you, in any way, about if she has
2 a -- if she has a fever that, you know, don't come back here
3 in thirty minutes, come back here right now?

4 A. No. Dr. Law's only thing to me was, hey, you know,
5 she's good to go, Dr. Young and I both agree with, you know,
6 her age, her health, the pain, you know, management she'll be
7 okay till Monday to follow up, don't let this go on, you know,
8 for a week, two weeks, you need to get this taken of in the
9 next couple of days cause she can develop problems from it,
10 and that was pretty much the end of him. When we got the
11 discharge instructions they were from the nurse. The nurse
12 never went line by line. She just said here, you need to sign
13 these, here's your papers, and here's a prescription, and then
14 we walked out, when Kelly walked back in to get her blood.
15 This wasn't like a sit down go over. I mean, we've all been
16 to hospitals, when has that happened.

17 Q. Did they give her something like a strainer or
18 something, too?

19 A. Yeah, yeah. They gave her a little white strainer to
20 strain her urine.

21 Q. Did Kelly make any comments to the discharge nurse that
22 she knew all about the strainer or anything like that, that
23 she had had a stone before, and she knew what she was suppose
24 to do?

25 A. I, I recall that, yes, I mean cause we might have even

1 still had the one from before, the same strainer, so she knew
2 what to do, yes. She was familiar with that.

3 Q. As far as straining her urine?

4 A. Yes.

5 Q. All right, so now, there's been some testimony
6 previously in -- in the course of discovery in this case that
7 it was never -- that surely you heard what Dr. Young says he
8 said to -- to you and/or Kelly about -- in his dictated note,
9 under consult, about returning. Do you recall that?

10 MS. SCALISE: Objection, Law, Dr. Law?

11 MR. FOSTER: Dr. Law, I'm sorry, Your Honor.

12 THE COURT: Very good.

13 MR. FOSTER: I'm not the only one that gets this mixed
14 up, Judge. I apologize.

15 THE COURT: Please restate the question to avoid
16 confusion.

17 Q. Let me restate the question. Did Dr. Law -- do you
18 recall there's been testimony in this case, period, that it
19 you must have heard what Dr. Law told you in his typewritten
20 note that we just had up on the board where he said -- where
21 he says he told you to come back immediately for any nausea,
22 pain, fevers, etcetera, that it wasn't written down anywhere,
23 therefore, you must have heard it. Do you remember that
24 testimony?

25 MR. TODD: Objection, argumentative.

1 **THE COURT:** I'll sustain that, Counsel. Please phrase
2 your question -- please rephrase your question.

3 **MR. FOSTER:** Thank you, Your Honor.

4 Q. Sean, do you recall anybody in this litigation, over
5 the six years, any of the Defendants or experts ever stating
6 that you must have heard what Dr. Law says he told you on that
7 typewritten report because it wasn't written down anywhere
8 that you were supposed to follow up at quote, "8:30 'A.M.
9 Monday morning"?

10 **MR. TODD:** Same objection.

11 **THE COURT:** Argumentative. Overruled.

12 **MR. TODD:** It's concerning leading.

13 **THE COURT:** Sustained.

14 All right, ladies and gentlemen, let's talk about that
15 for a moment. When you -- when you have a witness on the
16 stand you cannot lead the witness by asking a question that
17 contains the answer, and just as an example, if this was an
18 automobile accident case, which clearly is not, if you want to
19 say was the car blue, and this is your witness up there, you
20 can't ask your witness that because the answer is contained
21 within the question, and the appropriate way to say that is,
22 what color was the car. Now the rules are different when you
23 have cross-examination, you can lead a witness, but you cannot
24 on direct.

25 So now let's rephrase for argumentative reasons as well

1 as for leading reasons. Please proceed.

2 MR. FOSTER: We'll be done, Your Honor.

3 THE COURT: Go ahead.

4 Q. Sean, on these written discharge instructions that you
5 took home, read me what it says right here about calling Dr.
6 Young, please?

7 A. It says call -- call Richard Young's office 8:30 A.M.
8 Monday.

9 Q. Okay, is that what you were referring to a while ago
10 when he was -- when Dr. Law was explaining to you if you
11 waited two to three weeks to go see a urologist what might
12 happen?

13 A. Yes, he said, yeah, call Dr. Young's office, he was
14 familiar with the case, was the on-call urologist.

15 Q. Now, is that Kelly's signature?

16 A. Yes, that's Kelly's signature.

17 Q. Okay, and did you -- do you remember whether or not
18 they made Kelly sign an authorization to send her medical
19 records to Dr. Young ---

20 A. Yes.

21 Q. ---On Saturday?

22 A. I do remember.

23 Q. Okay, and what was it?

24 A. A release form to release her medical records.

25 Q. To Dr. Young?

1 A. Yes.

2 Q. All right, Sean, so go ahead and tell us now -- you got
3 home Saturday -- you got home Saturday ---

4 A. Uh-huh.

5 Q. ---Where did I interrupt you? I'm sorry for doing that
6 to you, but where did I interrupt you in your trip home, at
7 Wal-Mart?

8 A. When I got -- got back from Wal-Mart.

9 Q. Okay, continue, please?

10 A. Got back from Wal-Mart for the pain manag -- or for the
11 pain medicine, gave Kelly her first pill, and that's when she
12 tells me she was feeling hot, felt like a little feverish, you
13 know, warm, so we went ahead and took her temperature. And
14 her temperature was between 101.3 to 101.6. I remember it
15 because it never varied from there. I just can't remember the
16 exact. It was either 101.3 or 101.6. It wasn't .4, .5, it
17 was just one of the two, cause the whole weekend I took her
18 temperature four times, roughly four times Saturday. It was
19 the same the entire time.

20 Q. All right, did that concern you?

21 A. No, cause I didn't know -- when we left with the
22 discharge instructions, while it said that nobody said that to
23 me specifically. If they said it to Kelly I didn't know, I
24 didn't hear, and she didn't say anything to me, so I didn't
25 know -- I -- my thoughts were when we left she must have had

1 the fever, and they must have known then, otherwise -- you
2 know, I don't know, but it didn't concern me because it wasn't
3 at a -- I don't know at what point is a high fever, what
4 points a low fever to the doctors, you know. I know that it's
5 a fever but I don't know that -- is that emergency, is that --
6 I don't know, so it wasn't overly alarming. It was just yet a
7 fever; we had just come from the hospital, wouldn't they have
8 known, was our thoughts.

9 Q. All right, now as far as the discharge instructions go,
10 what were the side affects of the medications that -- if you
11 recall, that they gave Kelly?

12 A. Nausea and vomiting, and she -- she had some nausea.
13 She felt nauseous all through Saturday, and on Sunday is when
14 she actually vomited, but I know she vomited at least once.

15 Q. Did that make sense to you?

16 A. No. I -- when -- when Sunday and everything happened
17 and transpired on Sunday, when we did look at the
18 instructions, and I did read, the symptoms for -- to look out
19 for were also the side affects of the narcotics, and I
20 thought, well isn't that stupid, to me. Again I'm not a
21 medical person, I don't know, but it just seemed kind of --
22 why would you tell me look out for them in the discharge
23 instructions and then the side affects are the same things,
24 how am I supposed to know what's causing what. We associated
25 that with the pain medicine, it was Percocet.

1 Q. Okay, well let's go back to Saturday now. After you
2 got home what all happened Saturday?

3 A. Saturday, went home, took her temperature several
4 times. She basically rested. You know, she felt, you know,
5 warm, and she just kind of rested. She was kind of tired from
6 the medication and -- and just everything, and we didn't do
7 anything, we just stayed home, and not a lot transpired
8 Saturday. It was just her resting.

9 Q. Okay, and then we go into Sunday. What happened?

10 A. We go into Sunday morning, around 8:30 in the morning
11 when Kelly wakes me up screaming cause she's got shakes. I
12 mean I'm in the bed with her.

13 Q. When you say screaming, what do you mean?

14 A. I don't know, yelling. I don't how to describe it, I
15 mean it's not at the top of her lungs, but she's, you know,
16 hey, hey, you know, I don't know, it's -- but distressed.
17 It's -- it's just hard to recreate, I don't know. She's just
18 very upset, she's shivering and she's got chills. Now I have
19 never been through chills before, ever, so I didn't know what
20 they were, and it was weird to see cause she's just shivering,
21 and I put like five blankets on her. I'm laying there holding
22 her, trying to make her warm. I didn't know what that was.
23 It was the weirdest thing I'd ever seen and -- but that's when
24 she's shivering and I'm trying to warm her up, and she's got
25 these chills. And after I woke up with her she was calmer,

1 just shivering kind of uncontrollably, she couldn't stop. And
2 then that subsided. That was about 15 minutes, and then they
3 went away, and then she was normal again, like, you know, kind
4 of warm, and I don't know if I would say warm as far as she
5 just had the five blankets on her so she, you know, seemed
6 fine. And then about an hour later it happened again, and she
7 had the chills and same thing about ten minutes, so it went
8 from fifteen minutes to ten minutes, and that's when the
9 chills set in again, and she was starting to shiver, and I
10 warmed her up and I'm holding her, and then it stops, and
11 we're like, you know, man, what the hell, and that's when we
12 went ahead and read the discharge instructions to -- what to
13 look out for, and then that's when we saw the nausea and the
14 chills and everything like that, and we went from there.

15 Q. Well what did you do about it?

16 A. At that part -- excuse me -- that part I went ahead and
17 got the phone number from the discharge instructions, the 839-
18 1000 number, we read everything. It said to call, so I went
19 ahead and called and asked to speak to the doctor on call, and
20 they transferred -- and I don't recall if they transferred me
21 through, if somebody answered right away, I don't recall any
22 of that. It wasn't at the point where I'm trying to pay
23 attention for later purposes, I'm just concerned about --
24 about Kelly. So I call in and I ask -- and I tell them, you
25 know, we were just there yesterday, Kelly was just there, we

1 had -- you know, she had a kidney -- she was diagnosed with
2 kidney stone, she saw Dr. Law, she got the pain medicine, she
3 was supposed to follow up with the urologist, you know, she's
4 had this fever, you know, at one oh one three, one oh one six.

5 Basically I told them -- and replayed everything that
6 happened, and she had these chills, what should we do, and
7 that's when they told me what I should do, and their response
8 was, you need to follow up -- first take the pain medicine for
9 pain as needed, drink lots of fluids, that's important, follow
10 up with the urologist on Monday, and if you think you need to
11 come in, or if she thinks she needs to come in then bring her
12 in, and that was the gist of the phone call. It wasn't very
13 long. I don't know if she ever identified herself. I'm sure
14 if she said her name it just escaped me at the time cause I --
15 you know, I didn't think to write it down, and then that was
16 the end of that phone call.

17 Q. Did they tell you whether to come in or not?

18 A. She said based -- if Kelly thinks she needs to come in
19 to come in, so there was like just those few points, drink
20 lots of fluids cause that's important, follow up with the
21 urologist on Monday, take the pain medicine as needed, and if
22 she thinks she needs to come in then bring her in.

23 Q. Okay, so what happened next? What did Kelly do and you
24 do?

25 A. Kelly was obviously fine at the time. It was after the

1 chills, Kelly being Kelly, needed to take a shower cause she
2 didn't want to really go out and people seeing her kind of
3 looking disheveled like she was, so she goes in, she takes a
4 shower, kind of cleans herself up, gets dressed. I go to get
5 washed up and get ready, and that's when I come back out and
6 have a conversation with Kelly, and at the time she's sitting
7 there on the love seat closest to the -- closest to the door
8 and she says, you know, I don't know, I'm feeling better, I
9 think maybe the chills might have like broke up the stone or
10 shifted the stone or something, and again, we were lay people,
11 we don't know -- it seemed logical cause the chills, you know,
12 were just shaking like that, that maybe that happened, I have
13 no idea, and that's what Kelly thought. She felt better after
14 the chills, like maybe the chills did something, so she said
15 well I just want to wait on going to the hospital right now,
16 we can just -- you know, let's just wait and if it happens
17 again then we'll go ahead and go then, but if not, you know,
18 we're going to doctor tomorrow, we can just, you know, wait,
19 and then so we decided, okay, we'll just wait to see if it
20 happens again.

21 Q. When did you expect, did you have any expectations as
22 to when you were going to see Dr. Young on Monday, on Sunday?

23 A. On Sunday I assumed I would see him Monday, Monday
24 morning-ish, maybe sometime before -- you know in the morning
25 time. I wasn't -- yeah, I mean, I just assumed I'd see him on

1 Monday, Monday morning.

2 Q. Okay, on Sunday after she -- after you started getting
3 ready and then you just talked Kelly and then she said she
4 felt better did you -- did you feel any sense of urgency or
5 emergency at that time?

6 A. No, the person I talked to on the phone -- and I
7 explained everything that happened -- she didn't tell me it
8 was an emergency, I mean otherwise we would have just picked
9 up and gone in. Again, they're five to ten minutes down the
10 road from the house so it wouldn't have been, you know, a
11 stretch to drive down there.

12 Q. And do you recall when that phone call was?

13 A. Approximately 10:30, approximately, I mean because she,
14 she woke me up at 8:30, she had the chills, you know, then
15 about an hour later or so she had chills again then, you know,
16 we clean up, so it's, you know, 10, 10:30 somewhere around
17 there.

18 Q. Let me ask you this, how big -- how big was your house,
19 Sean?

20 A. Twelve hundred square feet, but it's a two story so the
21 downstairs is maybe 600 square feet, 700 square feet.

22 Q. Okay, and -- and your bedrooms are upstairs?

23 A. No, the master bedroom is downstairs.

24 Q. Okay, and was that -- where was that in relation to the
25 living room or where the t.v. was?

1 A. You're in the living room, I'm in the bedroom, so -- in
2 fact if you're at the couch, I'm at the bed, it was not very
3 far.

4 Q. Okay, did ya'll -- did ya'll have any plans for the
5 rest of the day as far as any company coming over or anything
6 like that?

7 A. Yeah, that -- that day we -- we only two friends. We
8 had just moved to Myrtle Beach. We had only been down here
9 four or five months or so, as a couple, you know, cause I was
10 commuting for a little while, but Chad and Laura Casselman
11 were our only friends down here, and they were planning to
12 come over that day.

13 Q. And what happened?

14 A. They knew of Kelly going to the hospital for the kidney
15 stone, and went ahead and called and said, hey, do you need
16 anything, and I said well, yeah, can you actually pick up
17 another thermometer for me because this one is broke. I think
18 on Sunday it didn't work at all anymore when I went to give
19 her another temperature, and it was just -- it's a digital
20 thermometer, you know, it was nothing fancy, nothing kind of
21 high end, not a glass thermometer and they said, no problem,
22 so they went ahead and picked up a new thermometer when they
23 came over, and they came over between 12 and one-ish.

24 Q. All right, did you take Kelly's fever -- temperature
25 that day?

1 A. I did. I took it several times that day, and that's
2 kind of the other weird part about it is that the temperature
3 was the exact same thing again. It was 101.3 or 101.6 which
4 is probably why it stuck out in my head the whole time,
5 because the temperature never changed between the two
6 different thermometers and, you know, I didn't think much of
7 it. Again her -- it didn't go up, it just stayed at what it
8 was, 101.3, 101.6.

9 Q. Well what did you and Chad and Laura do all that
10 afternoon?

11 A. We sat there and just kind of hung out. We -- you
12 know, on t.v. was the football playoffs, January, the patriots
13 and we kind of just sat there -- and just kind of sat there
14 and socialized, just talked. I mean they're not sports fans
15 and I'm -- I am. I'm a, you know, a Bears fan, but not an
16 overly big football fan. I'm a football fan. So we were more
17 just kind of talking, socializing while the game was going on.
18 Again, they're not sports fans so to them it wasn't a big
19 deal.

20 Q. Were either Chad or Laura having any conversation with
21 Lori -- with Kelly, or did they see her or ---

22 A. Kelly didn't -- she didn't want anybody to see her
23 cause she was, you know, in sweats and whatever, and her hair
24 was all whatever from laying down, so she didn't want to come
25 out. Laura had a conversation with her but I don't recall the

1 conversation.

2 Q. Okay, did you hear Mr. Aiken when he stood up in his
3 opening statement said that apparently you were more
4 interested in watching a football game than you were taking
5 your wife to the hospital?

6 A. Yes, I -- I heard that.

7 Q. What's your response for that?

8 A. My response is, if they had told me it was an
9 emergency, if I knew it was an emergency I would have went to
10 the hospital. I could care less about the football game.
11 Nothing else matters in my life except for my wife, so that's
12 just a cop out for them to push something on me bogus. I mean
13 what do I care about a football game or something on t.v., I
14 could care less.

15 Q. Did do you have any idea that your wife might be in an
16 emergency situation?

17 A. Not a clue. If I did know we would have been there.
18 Again, he never told me -- Dr. Law never said fever, chills,
19 you got to come in right away, oh, my gosh it's an emergency,
20 never, never once. We've all been to doctors. Does anybody
21 ever see that happening, I doubt it. Too, when the nurse gave
22 us the discharge instructions again, what happens, they come
23 in, you get the discharge instructions, you need to sign here,
24 sign here, here's your discharge. They don't go over that, at
25 least I don't ever recall that ever, and that was just how it

1 is. It wasn't like it was careless and, and -- it just was
2 like a normal routine thing for them. They gave us the
3 discharge papers, he did come and say Dr. Law and I talked, or
4 excuse me, Dr. Young and I talked, with the pain management,
5 her age, her health, she should be okay till Monday, and he
6 did say you need to follow up, you know, on Monday because if
7 you don't there could be problems and complications with a
8 kidney sto -- that's what he told me, and I remember
9 specifically him saying that, thinking, oh, man, we're not
10 going to wait, you know, cause -- and again, I think back to a
11 year prior, with the other kidney stone, that -- I mean she
12 had already passed it but this one she still had so I mean,
13 you know, I knew it was important, we had to make sure we
14 called, and that's why on Monday we did call at 8:30.

15 Q. Okay, tell -- tell us what happened Sunday night after
16 Chad and Laura left?

17 A. Chad and Laura left, Kelly didn't eat much cause ---

18 Q. Let me stop you before that. Did Chad or Laura ever
19 have -- express any concerns? Were there any concerns
20 expressed to you by Chad and Laura that perhaps your wife was
21 in an emergency situation?

22 MS. SCALISE: Your Honor, objection, hearsay.

23 THE COURT: Sustained.

24 Q. Continue and tell us what happened the rest of the
25 night?

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF HORRY) (08-CP-26-9047)
 3) (08-CP-26-9368)
 4 SEAN D. FAY, as Personal)
 5 Representative of the)
 6 Estate of Kelly L. Fay,)
 7 deceased.) TRANSCRIPT OF RECORD
 8)
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 B E F O R E:
 HONORABLE J. MICHAEL BAXLEY, Judge; and a jury.
 A P P E A R A N C E S:
 RUSKIN C. FOSTER, ESQ.
 BRADLEY HEWITT, ESQ.
 ATTORNEYS FOR PLAINTIFF
 MONTEITH P. TODD, ESQ.
 RANDOLPH L. LEE, ESQ.
 ATTORNEYS FOR DEFENDANTS, GRAND STRAND
 J. BOONE AIKEN, III, ESQ.
 ATTORNEY FOR DEFENDANTS, LAW AND CAROLINA HEALTH
 MARIAN SCALISE, ESQ.
 LYDIA L. MAGEE, ESQ.
 ATTORNEYS FOR DEFENDANT, YOUNG
 DIXIE COX EUBANK
 CIRCUIT COURT REPORTER
 FIFTEENTH JUDICIAL CIRCUIT
 VOLUME 2 OF 8
 (SEE VOLUME 1 FOR INDEX)

1 A. Laura had also brought us over some soup -- it was
2 either cream of chicken or chicken noodle, one of the two --
3 and that was the first time that Kelly had eaten, wow,
4 probably since like Saturday morning. She -- she just had a
5 hard time. And Sunday we had stopped taking the pain
6 medicine, Sunday morning. I was up late, you know, giving her
7 pain medicine, but by Sunday, as it rolled around, she thought
8 that was making her nauseous so she didn't want to take the
9 pain medicine anymore, and she felt like the pain medicine
10 wasn't really doing much anyways. I think on her scale she
11 told me it was like a three or four, and that's about what she
12 left the hospital at. Well, initially when she got the shot
13 she was like almost at a zero with the Dilaudid but by the
14 time we left it was starting to wear off and by the time we
15 got back home she was back to a three or four. When -- on
16 Sunday she stops taking the pain medicine Sunday morning and
17 then she felt better -- well enough to eat, and that's when we
18 had our -- a little soup, and I remember -- I remember that
19 part quite well. That was her last meal. We were watching
20 Jeff Corwin, a show we liked, on animal planet, and we were
21 just sitting there at the table like right next each -- on the
22 floor, at the table, eating just soup, and she felt a little
23 better and that was -- that was it for that night. She did
24 have chills one more time. They lasted about a minute, so,
25 again, in our layperson's perspective fifteen minutes, to ten

1 minutes to about a minute, and that was probably, I don't know
2 ten o'clock that night -- some -- I can't recall the exact
3 time -- and we thought, they're getting better, you know,
4 she's improving not getting worse, and we were going to see
5 the doctor in the morning. I mean if they weren't going to
6 see us Saturday, at whatever, the urologist wasn't there, he
7 surely, or whoever, at twelve o'clock, or ten o'clock on
8 Sunday, wasn't going to be there either, so we figured well
9 we'll wait till Monday morning when we call in the morning --
10 it was less than 12 hours away -- and that's what we did and
11 she went -- we went to bed Sunday night.

12 Q. All right, now either the doctor or the nurse, the
13 female voice that you spoke with on the phone at South Strand,
14 they told you to bring her back if who thought she needed to
15 come back?

16 A. If she felt she needed to come back in to bring her in.

17 Q. Did Kelly ever ask you or -- to take her back in, or
18 tell you that she felt like she needed to go back to the
19 emergency room the day after they had sent her home?

20 A. No. When we made the phone call the goal was to go in,
21 and then when Kelly washed up and came out, and then I washed
22 up and we were ready to go, that's when she told me she felt
23 better, and that's when she said, you know, I think we'll wait
24 for now to see if it happens again but I feel better.

25 Q. Were you doing anything that day to take care of Kelly.

1 or try to make her feel better in any way?

2 A. Well, I mean, yeah, bringing her stuff if she needed
3 it, water, taking her temperature. I mean she's -- it's not
4 like we are this far apart. I just didn't know, do I -- lay
5 there all day. She wanted to rest and sleep, and that's what
6 she did. She just kind of rested and -- and laid in bed. She
7 wasn't really wanting to be, you know, social butterfly or
8 walk around and I can't blame her.

9 THE COURT: Counsel, before you move to the next day
10 let's take our -- let's take an afternoon break at this time.

11 MR. FOSTER: Yes, sir. It's a good stopping point.

12 THE COURT: All right, ladies and gentlemen, we're
13 going -- we're going to take our afternoon break. We'll give
14 you an opportunity to go outside if you wish to do that, then
15 we'll just be subject to your call when you return and let's
16 all remain where we are while you depart the Courtroom. Have
17 a nice break.

18 (THE FOLLOWING TAKES PLACE OUTSIDE THE PRESENCE OF THE
19 JURY.)

20 THE COURT: Mr. Fay, I'm going to ask you not to speak
21 to the lawyers on either side of the case during the break
22 because you're a witness under testimony at this time. All
23 right?

24 A. Yes sir, Your Honor.

25 THE COURT: Thank you. You're welcome to step down

1 but, please, do not speak to the attorneys.

2 All right, the Court's now in recess approximately
3 fifteen to twenty minutes, subject to the call of the jury.

4 MR. FOSTER: Thank you, Your Honor.

5 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
6 THE PRESENCE OF THE JURY.)

7 THE COURT: All right, please bring in the jury.

8 MR. FOSTER: Your Honor ---

9 THE COURT: Yes.

10 MR. FOSTER: Can we approach the bench just one second?

11 THE COURT: Yes, you may come up while the jury is
12 coming in.

13 Go ahead and bring in the jury. We're fine,

14 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

15 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
16 JURY.)

17 THE COURT: All right, welcome back, ladies and
18 gentlemen, and you recall we are in direct-examination.

19 And you may proceed, Mr. Foster.

20 MR. FOSTER: Thank you, Your Honor, may it please the
21 Court?

22 THE COURT: Go ahead.

23 DIRECT-EXAMINATION BY MR. FOSTER CONTINUED:

24 Q. Sean, I believe we stopped off on Sunday night, did we
25 not?

1 A. Yes, Sir.

2 Q. Okay, now -- sorry to have to ask you to do this. I'm
3 going to ask you about the next day?

4 A. Okay.

5 Q. Could you, please, tell the jury what happened on
6 Monday?

7 A. Woke up maybe eight or so. Kelly asked for me to call
8 the urologist. She could have called but she didn't like
9 talking on the phone so much as far as calling for stuff like
10 that -- like calling for pizzas and stuff that would be me --
11 so I went ahead and called the urologist, their office, on
12 Monday at 8:30, and initially the girl said the doctor --
13 whoever I talked to -- I don't know if it's a receptionist,
14 nurse, doctor, I don't know, but whoever answered the phone --
15 said that there was no -- the doctor wasn't available that
16 day, he had surgeries and that he couldn't fit me in, and I
17 said, well, you know, we were referred there from Saturday,
18 he's aware of the case and we were told to call and ask, you
19 know, specifically for him, and she said, okay, well let me
20 check, and she goes, well he can see you at three and I said,
21 okay, 3 o'clock, and she goes 3 o'clock is good, and I said do
22 I need to bring anything, you know, should I bring the stuff
23 from South Strand and she said, yes, pick up the x-rays, and
24 so that was it, that was the end of the phone call as far as
25 talking to the doctor's office.

1 Q. Okay, and what was Kelly doing? How did she look?

2 A. She had washed up in between the time of the phone call
3 and ---

4 Q. What do you mean by washed up?

5 A. Like -- I can't recall if she took a shower that
6 morning, but she would have cleaned herself up, went into the
7 bathroom and, you know, wash her face or brush her teeth, the
8 normal stuff you do to kind of to start the day. She seemed a
9 little like groggy, just tired, and, and then that's when she
10 laid down and she said she'd be fine and we talked about it
11 and I said I'd pick her up at two o'clock to go to South
12 Strand to get her x-rays and then up to 82nd north to the
13 Grand Strand Urology and, and then I got ready for work after
14 the phone call.

15 Q. I mean did she -- did Kelly appear as though she might
16 be in danger in any way to you when you left to go to work?

17 A. No. I mean we were having conversations, we were
18 talking. She just seemed a little bit tired and she looked,
19 you know, a little warm, took her temperature, it's the same
20 temperature that was giving all weekend, and she just said she
21 was going to lay down and take a nap, and kind of just lay on
22 the couch and -- and just wait for me to come -- come pick her
23 up at two o'clock, but we were talking. I mean she was fine.
24 Nothing seemed abnormal when I eventually left.

25 Q. What did you tell her before you left?

1 A. Told her, you know be ready at -- at two, you know, I'm
2 going to pick you up so we can get up there, and I love you,
3 and I kissed her goodbye, and that was the last time I talked
4 to her.

5 Q. All right, what happened next?

6 A. So I left about 9:30, went to work, and probably a
7 couple of hours later I called her, called the house, and I
8 called the house a few times, and if you knew Kelly you knew
9 she liked to sleep. She was very good on the sleeping. That
10 was her thing. So I -- I assumed because of her being tired,
11 the kidney stone, she was just tired, and she was napping, and
12 that wouldn't be abnormal, and the fact that I had left at
13 9:30, and she was fine, and I was coming back at two I assumed
14 she would be fine, and so I called a few times, three times;
15 in fact -- I can't remember the exact times, probably 11:30,
16 12:30 and then on my way home, and -- and the phone never
17 answered. Of course the complex we lived -- we don't really
18 have any friends here -- and we were the first person to live
19 in that house as far as that whole new subdivision on the air
20 base, Windsor Gate. There was nobody next to us. There was
21 no neighbors. There was really nobody that we knew, so I
22 didn't know anybody to call to check on her, and that's when I
23 just left at like 1:30 or so to come -- come get her, and
24 check on her.

25 Q. All right, and what happened when you got home?

1 A. When I got home, opened the door, Kelly was laying on
2 the couch. She was kind of convulsing and gagging really bad,
3 white stuff was coming out of her mouth. I don't know what
4 that was. She was shaking, just convulsing. She seemed
5 unconscious. She had defecated and urinated on herself and I
6 was obviously scared beyond belief. I went to her. She was -
7 - pushed the table out of the way, kind of grabbed her off the
8 couch to the floor, kind of like swept anything out of her
9 mouth. She was choking. I didn't know what was happening. I
10 didn't know if she was choking or gagging, she had been there
11 for how long, and then that's when I called 911.

12 Q. All right, then what happened?

13 A. 911 got there. Of course, they -- I'm still new to the
14 area so I don't know where they were coming from, and it
15 seemed like it took forever. I don't think it was very long
16 but it seemed like it was like forever. They got there -- the
17 ambulance and the fire truck got there about the same time,
18 and they literally rushed in and, and rushed out, and in the
19 time of policing I've never really seen that. They just put
20 her on the gurney and they were gone, and they drove to, to
21 Grand Strand and just kind of left me, and I was shell
22 shocked.

23 As they left to Grand Strand I'm just sitting there
24 like. what the hell just happened, I'm here alone, I don't
25 really have any friends down here cause we had just moved and

1 my wife just left. I didn't know -- I was just standing
2 there. I'm like -- I mean like this, literally, I'm like
3 that, and so I -- I had to change my pants cause I had stuff
4 all over me, and then I, I just drove up there kind of -- that
5 was like the longest drive of my life. It's like a hundred
6 blocks -- it was hell -- and then I get there, and as soon as
7 I get there to the hospital they take me to a private room,
8 and -- like a private waiting room.

9 Q. Do you know if that was called the bereavement room or
10 not?

11 A. I don't know, it was inside the E.R., off to the right
12 or -- it's -- I've never -- that's the only time I've ever
13 been in there.

14 Q. Then what happened?

15 A. It gets kind of sketchy cause I'm -- there's so much
16 going on in my head. On the way up I'm calling people telling
17 them what happened, calling friends, calling family, I don't
18 know who I'm calling, I'm just calling people. And we get
19 there -- Chad and Laura are the first ones, friends-wise,
20 cause they are -- Chad and Laura Casselman. They are the only
21 ones that live in Myrtle Beach. Our next closest friends or
22 family are going to be, you know, Blake and Jennifer
23 Strickland, and they live in Fayetteville, about two and a
24 half, three hours away

25 So Chad and Laura get there fairly promptly, and I'm in

1 the room, and then that's when I meet Dr. Chi for the first
2 time. And Dr. Chi, I had assumed, was her attending
3 physician. I don't know -- he was the one I talked to most of
4 the night, most of the day, and he just kind of was getting a
5 history from me as far as to what happened, and then that's
6 when I kind of had relayed all the information from the
7 weekend and -- and the initial concern was meningitis, and
8 that's when I called the hotel, because the hotel -- you know,
9 I -- maybe she contacted somebody that -- interacted that had
10 meningitis, and so I called them and see if they had heard
11 anything and they didn't, and I relayed that.

12 And he had told me that Kelly was in ---

13 MR. AIKEN: Objection.

14 MS. SCALISE: Yes, Your Honor, same thing, hearsay.

15 THE COURT: I'm going to sustain, Counsel. That's
16 hearsay.

17 Q. Don't tell us what he told you. It's fine for you to
18 tell us what you told him, Sean. You are talking about Dr.
19 Chi?

20 A. Uh huh (indicating positive) I told him what, what had
21 happened and transpired. I checked on the meningitis and told
22 him that there was no meningitis.

23 Q. All right --

24 MR. FOSTER: Your Honor, may we approach just a second?

25 THE COURT: Go ahead. If you have something you wish

1 to state you can state it from there. Go ahead.

2 Q. Was there ever an occasion when you were in the room
3 with Dr. Chi and Dr. Law at the same time?

4 Let me let me start over. When you got there to the
5 hospital following Kelly, Sean ---

6 A. Uh huh (indicating positive)

7 Q. ---Was Dr. Law there?

8 A. Yes. I didn't see him initially till he entered the --
9 the whatever room I was in.

10 Q. Okay, and what happened when he came in the room?

11 A. He came in and apologized, and said I'm so sorry. I
12 believe he used Mr. Fay. I'm so sorry, Mr. Fay, I didn't
13 think this would happen, I didn't expect this to happen. He
14 seemed at a general loss of words, like shocked.

15 Q. All right, and when you were in there with Dr. Chi, was
16 Dr. Chi asking you questions about your wife's medical history
17 leading up to this, over the weekend?

18 A. He was. He was asking more questions about what had
19 happened and that's when he ---

20 Q. And what did you tell him?

21 A. Proceeded to tell him everything from Saturday to
22 Sunday, the going in -- to seeing at South Strand, the -- what
23 had happened, the fever, the chills from the day before, and
24 then -- and then what was prescribed for her.

25 Q. Okay, did you -- did you tell Dr. Chi anything about

1 whether or not she had been prescribed any medication other
2 than the Oxycot -- the Percocet or the Oxycodone?

3 A. Yes, I did, that there was no antibiotics that had been
4 prescribed.

5 Q. Was that -- did you tell him that as a result of
6 questioning ---

7 A. Correct.

8 Q. ---In that regard?

9 A. He had asked me, are you sure ---

10 MS. SCALISE: Objection, Your Honor. Hearsay.

11 Q. Did you tell him that ---

12 MS. SCALISE: I mean, get around the hearsay.

13 THE COURT: All right, just -- just a moment. I'm
14 going to sustain that. Again, Counsel ---

15 Again, ladies and gentlemen, the hearsay rule -- and
16 there are exceptions to it. I will tell you that one
17 exception is something that's said by a party is generally an
18 exception to the hearsay rule. That's why you've heard some
19 testimony about what one of the parties may have said.

20 Let me also just say to you by way of explanation about
21 the Court's role, I let the lawyers try their cases and I
22 respond if there's an objection. It's not the Court's
23 position to sit here and enforce what a rule may be. I'll
24 wait to see if there's an objection before the Court
25 intervenes. Just tell you that for your information.

1 these witnesses, I feel sure, will testify in some form, and
2 you'll be able to -- it's not an opportunity -- not an effort
3 to exclude something from you, it's just to make sure that
4 whatever evidence you have is competent and credible.

5 You may proceed.

6 **MR. FOSTER:** Thank you, Judge.

7 Q. Sean, after -- what happened after that conversation?
8 Let me ask you this, when that conversation -- don't tell me
9 what anybody said -- when that conversation took place with
10 Dr. Chi that you had, was Dr. Law in the room?

11 A. For one portion, yes, he was.

12 Q. Were there -- were there any of your friends in the
13 room?

14 A. Chad and Laura Casselman were in the room, and I don't
15 think Jennifer Strickland had arrived yet. I don't -- I don't
16 recall, I remember Chad and Laura being there in the room.

17 Q. Okay, what happened next?

18 A. The next part -- I mean there was a lot of back and
19 forths. They were going in and out of the -- I guess working
20 on Kelly. I mean it's hard because I don't know from -- I
21 mean I'm locked in a room -- other than what they're coming
22 and telling me.

23 Q. And I just want to know from your perspective what was
24 going -- I'm not asking you medical ---

25 A. I understand.

1 Q. ---What was going on medically. I just want to know
2 what was going on with you, and what you --

3 A. I'm just in the room, trying to call family, friends,
4 let them know what's going on. They eventually let me to see
5 Kelly. They had induced Kelly into a coma and were trying to
6 cool her down, and had the cooling blanket on her, and I got
7 to see her and talk to her. She was in like a private room,
8 like an ICU room. I don't -- I don't know what room it was
9 but it was, but there was -- it wasn't like an ordinary E.R.
10 thing with a curtain. It was a room with everything in there,
11 and it looked like everything was going on, and that was the
12 time I got to see her, and then eventually they moved us
13 upstairs. I -- I guess when she was stable enough we moved up
14 to an ICU room. She moved from the E.R. to an ICU upstairs.
15 and then they relocated us to a waiting room in ICU, and then
16 that's when more friends had shown up.

17 Q. You said you got to talk to her. Was she responsive?

18 A. No. She was in a coma, unconscious, but I was -- I was
19 just talking to her.

20 Q. You were talking to her. All right, what happened
21 next, Sean?

22 A. So we're upstairs, doctors are coming in, talking, Dr.
23 Chi, and just kind of going back and forth. I mean they're
24 telling us what's happening and, you know, what's going on,
25 and then I think that's the time I heard the first code.

1 Q. Take your time.

2 A. That's the part that sucks about the hospital, you hear
3 it all. They don't think to block out that stuff from the
4 waiting room, so we heard her code, and I knew she was dying.
5 It was then, or one of the other times, one of the doctors ran
6 in. He couldn't find the room and ran into our room. I'm
7 thinking, great. And they worked on her for a while, came
8 back and she made it. She survived the first time and I
9 thought, wow, that's the miracle, that was what we needed, and
10 kept saying she can pull through this, she's young, she's
11 healthy, she can pull through this. And pretty soon I got to
12 see her again, and they had a chaplain there. We had the
13 chaplain give the last rites.

14 Q. Was she Catholic?

15 A. Yes, yeah, on her mother's side. And that's when we
16 heard the next code, and then she didn't come back from that.

17 Q. What happened then, Sean?

18 A. The doctors came in and they let me see her, and they
19 let Jennifer, her best friend, see her, and we said our
20 goodbyes, and then -- and I talked to Dr. Chi. He gave me a
21 prescription for Ambien cause he said I was going to need it
22 to sleep. and I don't remember after that what happened.

23 They came to me with an autopsy. saying that by policy
24 the hospital, that they had to do an autopsy. and I had to
25 sign some form. I didn't really think it was a great time for

1 A. Yes, correct.

2 Q. That's the first thing you remember is, she woke up in
3 pain?

4 A. Yes, sir.

5 Q. It was lower right flank pain. That's where the --
6 that's the location of the pain she was complaining of.

7 A. I have no idea where her pain was. I just know she's
8 complaining in this region, and the classification -- it's
9 over here. It's a kidney area. I don't know. I mean, that's
10 what she's complaining. I -- so if you say so, okay, but I
11 don't know.

12 Q. We can go to your deposition. You gave a deposition in
13 2004.

14 A. I'm not trying to argue with you, sir, I ---

15 Q. But I'm just saying -- and I can show it to you ---

16 A. Okay, and I ---

17 Q. ---In your deposition in 2004 ---

18 A. Sure.

19 Q. ---You said lower right flank pain.

20 A. Okay. Again, yes, okay. I'm just not a hundred
21 percent positive, like, it's eight years ago that it happened.

22 Q. She had a kidney stone before?

23 A. Yes, sir.

24 Q. And she was thinking, I've got another kidney stone.

25 A. Yes, sir, uh-huh.

1 Q. And she wanted to go to the emergency room because the
2 pain was bad?

3 A. Yes, sir.

4 Q. And so from the time she got up to the time you left to
5 go to South Strand was maybe fifteen or twenty minutes?

6 A. Yes, sir, correct.

7 Q. And South Strand is three miles from where you were
8 living?

9 A. Four but, yes.

10 Q. All right, a five minute drive.

11 A. Yeah, five, ten, correct, depending on traffic. Yes,
12 sir.

13 Q. In your deposition you told me it was -- you said it
14 was five minutes.

15 A. Sure. It's around the corner from the house, but it's
16 five to ten, depending on traffic but, yes sir.

17 Q. And in 2004 it was five minutes. Do you want to look
18 at your deposition?

19 A. No, sir. Again, I'm not trying to argue with you. If
20 you say I said that, then that's fine.

21 Q. You go to the E.R..

22 A. Yes, sir.

23 Q. And there's nobody in the waiting room in the E.R..

24 A. Correct. That I can recall. No. Yeah.

25 Q. Now you had worked at a job -- a hospital. You and

1 that time, yes, correct.

2 Q. He ordered the x-ray?

3 A. Yes sir.

4 Q. And so Kelly went to the x-ray?

5 A. Yes sir.

6 Q. And the x-ray showed probably a kidney stone?

7 A. Yes, sir.

8 Q. And then that's when Kelly got some pain medication,
9 correct?

10 A. Yes sir, I -- yeah.

11 Q. And then at that time Dr. Law ordered the urinalysis?

12 A. Yes, sir.

13 Q. And you were asked to step out of the room while the
14 nurse was doing the cath for the urinalysis?

15 A. Correct, yes. Kelly asked if I would.

16 Q. And then Dr. Law ordered the CT scan?

17 A. That's when he came in, and he told me about that it
18 seemed really odd because it was too clean, and there wasn't
19 any blood or bacteria, and that's when he ordered the CT, yes
20 sir.

21 Q. The CT scan was ordered following the urinalysis?

22 A. Yes sir, yes.

23 Q. So did you -- would you have gone to Kelly when she was
24 in the CT scanner? You would have been in the x -- radiology
25 department with her?

1 A. No, I stayed in the room both times.

2 Q. She would have gone to a different part of the
3 hospital, to radiology, to where the CT scanner was?

4 A. Certainly. I would say -- yes.

5 Q. Now, Kelly was -- left the hospital around twelve that
6 day?

7 A. Yes sir.

8 Q. While she was there at Grand Strand she didn't have any
9 complaint. There was no complaint by Kelly that she had any
10 fever or chills?

11 A. Not that she made known to them, no, but to me, yes. I
12 mean to me there, no. When we got home she did. She was
13 flush as we were leaving -- before we left.

14 Q. Let me make sure.

15 A. Okay.

16 Q. I want to make sure. I'm going to ask this question,
17 there was no complaint by Kelly, to anyone, while she was at
18 the hospital, at South Strand, that she had a fever, or that
19 she had chills?

20 A. Correct. I do not recall her saying to anyone there
21 that she had a fever or chills, correct.

22 Q. Now she was discharged, and you received discharge
23 papers?

24 A. Yes sir.

25 Q. And Kelly signed them?

1 A. Yes sir.

2 Q. You have identified that, that was her signature?

3 A. Yes sir, that was her signature.

4 Q. You had the opportunity to take those home with you?

5 A. Yes, we did.

6 Q. Had the opportunity to read them?

7 A. Yes, we did.

8 Q. Had Dr. Young's phone number on there?

9 A. I believe so, yes, it did, the 448 number.

10 Q. You had -- and you sort of go through them?

11 A. Yes sir.

12 Q. And you certainly -- there would -- you could -- if you
13 wanted to sit down and take the time to read them you had that
14 opportunity?

15 A. Uh huh (**indicating positive**)

16 Q. Is that a yes?

17 A. Yes sir.

18 Q. Now, let me ask you a little bit about the pain right
19 now, not your pain, but Kelly's. When she got to the
20 emergency room the first time she was in pretty severe pain?

21 A. Yes sir, she was.

22 Q. You didn't think it was quite as bad as the first
23 kidney stone, but it was ---

24 A. Correct, yes sir.

25 Q. It was bad pain?

1 A. Yes, sir.

2 Q. And once she got the pain medication in the E.R. that
3 alleviated some of the pain?

4 A. The first stuff, yes, correct. Then she got the
5 second, Dilaudid, and then that -- yeah.

6 Q. What I'm saying, not very -- not very artfully, but
7 once she got the pain medication she got much better?

8 A. She felt better, yes sir.

9 Q. And -- and the pain never increased -- the pain that
10 she was having, it never increased after she left the
11 hospital, South Strand?

12 A. Correct. She didn't experience any more pain than when
13 she left, at the three or four, yes.

14 Q. Now you go home and you drop -- you go by Wal-Mart, you
15 take her home, you go back to Wal-Mart, you get the
16 prescriptions, and then -- then you go back home again?

17 A. Yes sir.

18 Q. And you were giving her pain medication that Saturday,
19 Saturday night?

20 A. Yes sir.

21 Q. Now you stopped giving her pain medication Sat -- well
22 I guess say Saturday morning. It was Sunday morning --

23 A. Saturday night, yeah. I know what you ---

24 Q. Saturday night?

25 A. Yeah. Sunday morning.

1 Q. Five A.M. on -- we'll say -- how about 5 A.M. on the
2 27th?

3 A. Sure, okay.

4 Q. You stopped giving her pain medication?

5 A. Yes, sometime Sun -- exactly when I don't recall, other
6 than her and I having the discussion of, she doesn't want to
7 take any more because it was making her nauseous, she felt it
8 was making her nauseous. I don't know when it exactly stopped
9 but it was Sunday morning.

10 Q. And I don't mean to qui' -- 5 A.M. or if -- early, in
11 the very early A.M. of that Sunday morning you stopped.

12 A. Okay, yes sir.

13 Q. Stopped. No more pain medication?

14 A. Correct.

15 Q. And the pain -- once she stopped the pain medication
16 her pain didn't increase?

17 A. Correct. She never said she had more pain. No.

18 Q. And this call -- you talked about the call to South
19 Strand.

20 A. Yes sir.

21 Q. And that call was sometime around 10 or 10:30?

22 A. Yes sir.

23 Q. Now after that call you started getting ready to go
24 back to the emergency room?

25 A. Yes sir.

1 Q. So there's the phone call, you talk to Kelly, you made
2 the decision we're going to go back to the emergency room, ---
3 A. Yes sir.
4 Q. ---Correct?
5 A. Yes sir, at that time.
6 Q. And then you changed your mind?
7 A. No.
8 Q. Well, did you go to the emergency room?
9 A. You said I changed my mind. You need to clarify.
10 Kelly changed her mind.
11 Q. Did you -- you two still wanted to back to the
12 emergency room.
13 A. Okay. Can you re-ask your question, sir? You've
14 confused me as to what you're asking?
15 Q. Okay. You made a decision --
16 A. We or --
17 Q. After the phone call you made a decision ---
18 A. I -- meaning I. You said you.
19 Q. Okay, you, made a decision you were going to go back
20 into the emergency room, correct?
21 A. I had thought we were going to the emergency room, yes.
22 Q. Kelly started getting ready to go back to the emergency
23 room?
24 A. Correct, yes.
25 Q. But she didn't go back to the emergency room?

1 A. We, together, did not, no. Correct.

2 Q. Later on that day your friends came over ---

3 A. Yes, sir.

4 Q. ---Watched a football game?

5 A. Yes sir.

6 Q. You were doing your blog?

7 A. Yes sir.

8 Q. And that blog was done -- I think it's in evidence,
9 Defendant's Exhibit Number 10. Do you still have it up there
10 with you?

11 A. No sir, I do not.

12 MR. TODD: Can I just use this?

13 MR. FOSTER: Sure.

14 MR. TODD: Thank you.

15 Q. This is Exhibit 10. I don't whether I can see the --
16 can see this or not, but it's "Poor Kelly", is what you typed
17 in?

18 A. Yes sir.

19 Q. And this was done -- on the bottom it was Kelly update,
20 January the 27th, 2002, and the update was at 19:25?

21 A. Uh huh (indicating positive)

22 Q. Military time is 7:25?

23 A. Yes, sir.

24 Q. But the one, "Poor Kelly", that was done at 1/27/02 at
25 13:15, so that would be 1:15 P.M. on Sunday afternoon?

1 A. Okay, yes sir.

2 Q. And you are talking about Kelly and her trip to the
3 emergency room, and how she had been doing the next since --
4 since she returned ---

5 A. Yes, sir.

6 Q. ---When you returned home?

7 A. Uh huh (*indicating positive*)

8 Q. There wasn't any mention of any phone call in this
9 blog, was there?

10 A. Nope, no phone -- no mention of phone calls, no.

11 Q. Now did you try to call Dr. Young that weekend? You
12 had his number, it was on the discharge instructions; did you
13 try to call him?

14 A. No sir, I did not.

15 Q. All right, when you called Dr. Young's office Monday
16 morning, you didn't ask -- you didn't seek any advice from
17 him, did you?

18 A. No, sir.

19 Q. You were just looking for an appointment?

20 A. Yes sir, I believe I was just looking for an
21 appointment, correct. Yes sir.

22 Q. You didn't ---

23 MR. FOSTER: Your Honor, I believe he's cutting the
24 witness off. I think he's entitled to finish his answer.

25 THE COURT: If that's an objection, I'll sustain that.

1 - from South Strand, including the x-rays, and then the next
2 day you went out and you and picked up all of the records from
3 Grand Strand?

4 A. Yes sir, I did.

5 Q. So that was -- that was two weeks after your wife's
6 death; is that correct?

7 A. Yes sir.

8 Q. And so then -- but -- and the reason you picked them up
9 is because you were contemplating a lawsuit?

10 A. No sir.

11 Q. No?

12 A. I picked them up because I wanted to get answers to
13 make sure that stuff was protected, whether it was through --
14 however, but if a lawsuit happened then, yes, I'd have them,
15 but that wasn't the only reason, or the sole reason. It was
16 to protect the records to find out answers.

17 Q. One of the reasons you picked them up is to determine
18 whether or not you were going to pursue a lawsuit?

19 A. If there was a mistake, yes sir.

20 MR. TODD: I'm sorry. No further questions, Your
21 Honor.

22 THE COURT: All right, then cross-examination from
23 Defendant, Dr. Law.

24 MR. AIKEN: Thank you, Your Honor.

25 CROSS-EXAMINATION BY MR. AIKEN:

1 Q. Mr. Fay, I believe your marriage to Kelly was June 9
2 and not June 17th; is that right?

3 A. Yes sir, June 9th, 1995.

4 Q. All right, sir. Mr. Todd went through the different
5 things that happened. I want to confirm that it happened, Mr.
6 Fay, according to timeline. You got to South Strand at eight
7 o'clock; is that right?

8 A. Yes sir.

9 Q. And for about three minutes, four minutes like Mr. Todd
10 said, you were not with Kelly, you were checking her in?

11 A. Correct. Even maybe five minutes, I mean it just seems
12 a fast process but, yes, I was not with her.

13 Q. And according to the hospital record, the complete
14 vitals, with temperature, were taken. Her temperature was
15 98.1, blood pressure 130 over 84, heart rate 88 ---

16 MR. FOSTER: Your Honor, I'm going to have to object on
17 competence.

18 THE COURT: Excuse me?

19 MR. FOSTER: Competence, for him to answer these
20 medical questions.

21 MR. AIKEN: Just asking him, Your Honor, if he disputes
22 that's what's in the record.

23 THE COURT: I'm going to overrule, Counsel, your
24 objection.

25 MR. FOSTER: Thank you, Your Honor.

1 **THE COURT:** You may proceed, Mr. Aiken.

2 **MR. AIKEN:** All right, Your Honor.

3 Q. You're not disputing that, are you, Mr. Fay?

4 A. No sir.

5 Q. And she was in the room by 8:06?

6 A. Yes sir. That seems right.

7 Q. Dr. Law was there right when you are there, about 8:06?

8 A. Yes, sir.

9 Q. And Dr. Law seemed very attentive, listening to her
10 questions?

11 A. I do remember him being attentive, yes sir.

12 Q. And he was concerned about her?

13 A. He did seem concerned.

14 Q. He sent her to x-ray at 8:20?

15 A. Yes sir.

16 Q. And when she went to x-ray you did not go with her; is
17 that right?

18 A. That is correct, I did not.

19 Q. That's one of the few times you weren't with her
20 continuously?

21 A. Yes sir, correct.

22 Q. At 8:30 she's given an IV medication, Toradol 30
23 milligrams. She was given some medicine?)

24 A. Yes sir.

25 Q. And you remember that?

1 A. Vaguely, but yeah, I do remember the two medicines, yes
2 sir.

3 Q. And you've already testified, Mr. Fay, that you
4 understood they went ahead and drew some blood in case it was
5 needed they wouldn't have to stick her again?

6 A. Correct, that's what the nurse said, yes.

7 Q. Okay, at 8:35 they had taken the urine sample and sent
8 it off to the lab; is that right?

9 A. Yes sir.

10 Q. You're not challenging that time frame?

11 A. I'm not -- I don't remember the times, but that's in
12 the right time frame, so it seems logical to me that that's
13 correct.

14 Q. So you're not disputing it?

15 A. No sir.

16 Q. At 8:35 they gave her some Phenergan IV push; is that
17 right?

18 A. Yes sir.

19 Q. You're not denying it?

20 A. No sir.

21 Q. Then at 8:52 the x-ray KUB is back, and Dr. Law
22 discussed with you and Kelly that he felt like she had a right
23 side stone; is that right?

24 A. Yes sir.

25 Q. Okay, then at 9:10 would you agree that what the chart

1 says the pain score was better, she was down to five to six,
2 but still in pain?

3 A. Yes sir, yes.

4 Q. Then do you dispute that at 9:10 a blood pressure,
5 pulse, and respirations were again taken?

6 A. I don't dispute that, no. I can't say I recall but I
7 am not disputing it, no sir.

8 Q. Then Dr. Law told you he was suspicious on the KUB film
9 of a kidney stone. He wanted to confirm that so a CT was the
10 best diagnostic study; is that right?

11 A. What I specifically remember was the urinalysis
12 results, that him being suspect of those, but I don't know --

13 Q. And the urinalysis, though, he told you was completely
14 normal, no red blood cells, no white cells; is that right?

15 A. What he said to me was it was odd because it was so
16 clean, there was no blood, no bacteria, but he didn't he
17 didn't say white blood cells like that.

18 Q. Okay?

19 A. I'm assuming he was dumbing it down for me.

20 Q. Telling you it looked fine, looked normal?

21 A. It looked clean, yeah.

22 Q. Okay, at 9:30 she goes to CT?

23 A. Yes sir.

24 Q. Now that's the second and last time you were not with
25 her in the hospital on January 26th; is that right? You did

1 not go with her to CT?

2 A. I did not go with her to CT, no.

3 Q. Then at 9:35 she's given some more medicines, this time
4 Dilaudid?

5 A. Yes, sir.

6 Q. At 9:40 the nurse records no pain, so she was much
7 better from a pain standpoint?

8 A. Yes, sir.

9 Q. Okay, then at 10:20, Mr. Fay, she's back from CT and
10 they had a blood pressure, pulse, respiration is recorded and
11 no pain; do you deny that?

12 A. She went to CT at 9:30 and came back an hour later but
13 had the Dilaudid IV push in between, that would be incorrect.

14 Q. She had a 9:30 CT?

15 A. That's incorrect then.

16 Q. When did she go to CT?

17 A. Well if she went to CT did they give a Dilaudid push
18 while she was there? You're saying 10:20 she was back from
19 CT.

20 Q. At 10:20 she was back from CT?

21 A. So they gave her the Dilaudid push at CT?

22 Q. No, sir ---

23 A. That's what ---

24 Q. ---They took her to CT at 9:30, but the Dilaudid at
25 9:35?

1 A. But you just said she's back from CT at 10:20. I'm, --
2 I'm trying not to argue, I'm just trying to make sure.

3 Q. That's fine, yes sir. She's back from CT, she's
4 already been given Dilaudid, she's been given the Toradol, she
5 goes to CT and she's back by 10:20; do you deny that?

6 A. And I apolo -- all right, let's start one more time
7 from the 9:30. So at 9:30 she goes to CT?

8 Q. Yes, sir.

9 A. And then at 9:35 they give her the Dilaudid?

10 Q. Well that might be -- I understand what you're saying?

11 A. Okay.

12 Q. That might be a little out of whack?

13 A. Okay.

14 Q. But they gave her the Dilaudid, she's at CT. She comes
15 back at 10:20 is my point?

16 A. Okay.

17 Q. Now from 10:20 on, Mr. Fay, you were with her
18 continuously; is that right?

19 A. Yes, sir.

20 Q. You never went to the bathroom, you never got -- went
21 to get something to eat, you never walked around, you were
22 with your wife the entire time from 10:20 until she was
23 discharged at 12:00; is that right?

24 A. I did not get anything to eat, did not walk around, I
25 don't recall if I went to the bathroom. That might not have

1 stood out in my head, but I didn't leave for any other
2 purpose, so I don't recall leaving, no.

3 Q. You told me when we talked to you at the deposition you
4 were with her continuously?

5 A. Yes, other than the two times that I recall, yes.
6 Again I don't -- like I said, I'm not disagreeing. I don't
7 recall leaving -- bathroom would be the only thing but, I
8 don't recall leaving, no.

9 Q. I understand. So at 11 -- well, she was discharged at
10 twelve o'clock.

11 A. Yes, sir.

12 Q. So at 11:38 you would have been with her?

13 A. Yes, sir.

14 Q. And you remember Dr. Law coming to speak to you and
15 Kelly about the results of the CT?

16 A. Yes, sir.

17 Q. And you understand from this record, Mr. Fay, that Dr.
18 Law, at 11:38 dictates, in his machine -- you understand what
19 a "D" means, that means dictate?

20 A. Yes, sir.

21 Q. You're not denying that?

22 A. No, sir.

23 Q. I did explain to the patient, however, that if her pain
24 becomes out of control, or if she has increasing nausea,
25 vomiting, any fever or chills, that she is return to the

1 emergency department immediately; you understand that?

2 A. I understand what he said on the dictation, yes, sir.

3 Q. Okay, now as far as the time the rest of that day, Mr.
4 Fay, you told us at your deposition that you were discharged
5 at 12, and you got home about 1:00?

6 A. Roughly, yes, sir.

7 Q. And then you dropped Kelly off and then you went back to
8 Wal-Mart ---

9 A. Yes, sir.

10 Q. ---To get the medicine. You dropped the medicine off
11 on the way home, prescription ---

12 A. Yes, sir.

13 Q. ---You dropped Kelly off and you went back to Wal-Mart
14 to get the medicine?

15 A. Yes, sir.

16 Q. And then you came back with the medicine, and at that
17 point forward she had a fever the rest of the weekend?

18 A. Yes, sir, of --- of the 101.3 and 101.6, yes, sir.

19 Q. Okay, then we've talked about the fact, Mr. Fay, that
20 Kelly woke you up Sunday morning.

21 A. Yes, sir.

22 Q. And didn't you tell this jury that she had never had
23 chills -- you had never seen or observed chills before?

24 A. Yes, sir. I don't remember seeing chills or observing
25 chills before.

1 Q. Ever?

2 A. Do I recall it?

3 Q. Yes, sir, with Kelly?

4 A. With Kelly, no.

5 MR. AIKEN: Just give me one minute, please. Your
6 indulgence for one minute, Your Honor?

7 THE COURT: Yes, sir.

8 MR. FOSTER: Your Honor, may we approach one second
9 while he's doing ---

10 THE COURT: You may.

11 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

12 THE COURT: Are you ready, Mr. Aiken?

13 MR. AIKEN: Yes, sir.

14 THE COURT: All right, please proceed.

15 Q. I've got Dr. Kommu's records here, Mr. Fay, and they're
16 in evidence, and she had a visit with him on July 28th of
17 1999, and he said Kelly is a pleasant twenty-three year old
18 married female, a patient of Dr. Kommu, who comes into the
19 office today complaining of a four day history of what
20 initially presented as diarrhea, progressing to nausea,
21 malaise, fatigue, fevers, chills, sweats, and some other
22 things; you don't recall that four days of Kelly having chills
23 back in 1999?

24 A. No, I don't, and to describe what chills are to what
25 she had then, I don't know if she was referring to the same

1 thing so I don't know, but no, I don't recall that.

2 Q. Okay.

3 A. Otherwise I would have said, yes.

4 Q. Okay, now we get to Sunday ---

5 A. Yes sir.

6 Q. ---Mr. Fay, and the way you describe it in this blog --
7 and by the way we've got the blog, Exhibit 10. At the top
8 this says SeanFay.com, about me, Sean's daily dribble archive.
9 That's what you named it?

10 A. No, it's ---

11 Q. Right here?

12 A. Yeah, it's a lot easier when you're pointing to it, but
13 it's not quite what you think it is. The about me portion is
14 about me, cause I'm -- would be Sean Fay, then the family
15 portion is about the family, Kelly, career, hobbies. It's a
16 list going down the left side of the directory. The name of
17 the web site is SeanFay, the blog is Sean's daily dribble,
18 just me rambling on, like I tend to do here.

19 Q. And you talk about these chills, Mr. Fay, in here,
20 Saturday morning I was awakened by my wife who was in major
21 pain; is that right?

22 A. Yes, sir.

23 Q. And this morning she woke me up screaming, that she was
24 shaking uncontrollably, and was she ever, major fever, then
25 major hot flash, then major fever again. That's how you

1 describe it. And what time was this first entry made on your
2 blog, the posting as you call it?

3 A. I'd have to see it.

4 Q. Here's a copy. Can you tell me what time?

5 A. 1:15 -- 1:15 in the afternoon.

6 Q. On what day?

7 A. On Sunday.

8 Q. At 1:15 on Sunday, and then you talk about other
9 things, and on a side note, Kelly and I worked for Cape Fear
10 Valley Hospital Health System for three years, and it -- and
11 in our experience it took, on average, three hours before you
12 could see a doctor, and six hours before you were out, well we
13 saw a doctor within two minutes, and were out in three hours
14 so that was a big shock, so you were pleased with the service
15 you got at the hospital?

16 A. With the speed and efficiency, yes, sir.

17 Q. Okay, and then before you complete that one -- that
18 might have been later. At 1/27/02, at 4 -- 04:22. Was that
19 early in the morning?

20 A. That would be -- yes, sir, thank you. That would
21 have been before that one.

22 Q. Okay, what time was that?

23 A. 4:22 in the morning, Saturday night, Sunday morning.

24 Q. Okay, and here you're talking about -- and the jury
25 will have it -- your work as a web master at Legends Golf.

1 You said, on a side note, I'll be updating the web site, a lot
2 of information needs to be updated. I'll try to update some
3 tomorrow and over the week, the next two weeks. My job
4 information is months old. Currently I'm working for a large
5 golf hotel chain thing. Here are the web sites I designed,
6 Legends Golf and Sands Resorts, both alive, and Sands Resorts
7 is the big e-commerce site of the two, and I'm pretty proud
8 how business is doing?

9 A. Yes, sir.

10 Q. You are just talking about your work in that particular
11 blog?

12 A. Yes, sir.

13 Q. Then after Kelly wakes up, Mr. Fay, Sunday morning at
14 10 or 10:30, then plans were for the Casselmans to come over
15 to watch football?

16 A. Yes, sir.

17 Q. They get to your house, Kelly's house, at twelve
18 o'clock?

19 A. Uh huh (indicating positive)

20 Q. They don't leave till sometime between six and eight;
21 is that right?

22 A. They got there between twelve and one-ish. I don't
23 recall the exact time, but -- and they left between six and
24 eight, yes.

25 Q. Okay, so they were there all afternoon?

1 A. Yes, sir. I -- I -- yes.

2 Q. Okay, and New England Patriots were on. You remember
3 them playing, you don't remember the other team?

4 A. Yes, sir, I don't remember the other team.

5 Q. Now let's talk about looking at these discharge
6 instructions, Mr. Fay. You say you did that Sunday?

7 A. Yes, sir.

8 Q. Sunday morning?

9 A. Sunday morning, yes, sir.

10 Q. And you're pretty sure about that?

11 A. That I recall looking at the discharge papers?

12 Q. Yes, sir?

13 A. Yes, sir.

14 Q. Okay. I believe, Mr. Fay, at your deposition, under
15 oath, when you were first asked about that, about when you
16 looked at the discharge papers, was not your response that you
17 might have read through the discharge instructions on Sunday?

18 A. If you said that's what my response was, then I would
19 say, yes, that's what my response was.

20 Q. Yes. And then you also said, I don't think it was
21 after her death and I am ---

22 MR. FOSTER: Your Honor, object, improper impeachment.

23 Q. Do you remember saying, Mr. Fay ---

24 THE COURT: Sustained. Rephrase, please.

25 MR. FOSTER: Thank you, Your Honor.

1 Q. Do you remember saying at your deposition, I don't
2 think it was after her death, and I'm assuming it was when
3 everything had happened Sunday morning. You were assuming, is
4 that what you said?

5 A. If you're reading verbatim then, yes sir, that's what I
6 said. I won't dispute that if you're reading what I said.

7 Q. Yes, sir. And you've already confirmed to Mr. Todd
8 that you don't recall Kelly having any other adverse signs in
9 the E.R. like fever, chills, sweats, she wasn't hot, she
10 wasn't warm to touch in the emergency department, was she?

11 A. I think -- I believe with Mr. Todd I said that she
12 hadn't complained to anyone but towards the last portion as we
13 were leaving she looked flush, but that was it as far as that,
14 but, yes.

15 Q. Okay ---

16 A. And I think I did say that in my deposition, that when
17 we were leaving I noticed it cause she was sweating in the
18 car, which would have been odd for January.

19 Q. You left -- correction -- you -- getting ahead of
20 myself. You were asked, I think, about this sheet by Mr.
21 Foster, right?

22 A. Yes, sir.

23 Q. Okay, and down at the bottom do you dispute that this
24 is Dr. Law's handwriting where it says, call Dr. Richard
25 Young's office at 8:30 A.M. Monday?

1 **MR. FOSTER:** Your Honor, I'm going to object to that,
2 competence.

3 **THE COURT:** Actually the question was, do you dispute
4 it, and you may answer it. Overruled.

5 **MR. FOSTER:** Thank you.

6 Q. Did he not tell you to call Dr. Young's office at 8:30
7 on Monday?

8 A. You're -- for your question, I don't know if that's his
9 signature, or not or he wrote it, but yes, he did tell us to
10 call on Monday at 8:30.

11 Q. And you did, in fact, call Monday at 8:30?

12 A. Yes, sir, I did.

13 Q. All right, sir, and you've got military training?

14 A. Yes, sir.

15 Q. And you were in the Coast Guard?

16 A. Not at the time I wasn't, no, but I am now, yes, sir.

17 Q. But you got -- you went through the police academy and
18 you finished that in 1995; is that right?

19 A. Yes, sir.

20 Q. Okay, bear with me, please?

21 A. Yes, sir.

22 **MR. AIKEN:** The Court's indulgence just a minute,
23 please.

24 **THE COURT:** Yes, sir.

25 Q. This is my final question. The call that you are

1 telling this jury, Mr. Fay, you made Sunday morning, was
2 between 10 and 10:30?

3 A. Yes, sir, that's -- as I recall, yes, sir.

4 MR. AIKEN: That's all, thank you.

5 A. Approximately that time. Thank you.

6 THE COURT: And now cross-examination for Dr. Young.

7 MS. SCALISE: Thank you, Your Honor.

8 CROSS-EXAMINATION BY MS. SCALISE:

9 Q. Mr. Fay, you were asked some questions about a
10 conversation that you overheard with Dr. Law, and I believe
11 you testified that you were in the room with Kelly, and you
12 overheard Dr. Law sitting at the physician's desk; is that
13 right?

14 A. Well, I saw him at the work station. I don't if it's a
15 physician's desk or the nurses station, but he was standing
16 behind it on the phone, yes.

17 Q. Okay, I think your testimony was you heard some things
18 being said about Kelly?

19 A. Correct.

20 Q. Okay, but you don't know whether or not Dr. Law was
21 talking to Dr. Young, or whether he was talking about her to
22 a radiologist, whether he was talking to anybody else, do you?

23 A. I do not know, correct.

24 Q. Okay, so for you to say that he was talking to Dr.
25 Young that would be pure speculation; isn't that true?

1 A. Other than when he came in and told me he had talked to
2 Dr. Young.

3 Q. Okay, but as far as that particular phone conference
4 you didn't who he was talking to?

5 A. Correct, correct.

6 Q. All right, and I believe it's fair to say, based on
7 your testimony, you never talked to Dr. Young?

8 A. That is fair to say, correct, I did not talk to him.

9 Q. And, in fact, you never even met Dr. Young until after
10 you sued Dr. Young and he came to your deposition; isn't that
11 right?

12 A. That is correct.

13 Q. All right, and wouldn't you agree that Kelly Fay never
14 saw Dr. Young?

15 A. In person correct, she never saw him in person.

16 Q. And she never talked to Dr. Young, did she?

17 A. She never talked to him, no.

18 Q. And even though you had Dr. Young's phone number,
19 neither you nor Kelly called Dr. Young over the weekend, did
20 you?

21 A. We did not, no.

22 Q. I want to talk a little bit about Saturday morning,
23 before you came to the E.R.. I believe in your testimony, in
24 your deposition, you said that you woke up and you went right
25 to the E.R. and in fact it was about fifteen minutes; isn't

1 that what you said?

2 A. We got up around 7:30, we were there at 8. I mean it's
3 eight years ago, I'm pretty close.

4 Q. Okay, and I believe you told the jury she didn't have
5 any vomiting, or any nausea that morning that you were aware
6 of.

7 A. Correct.

8 Q. She didn't feel warm, or complain that she was warm?

9 A. No, not that morning, no.

10 Q. Okay, and she actually told you that she was not in as
11 much pain as she had been with the first kidney stone; isn't
12 that right?

13 A. She -- she definitely didn't present that way as far as
14 how she was the first time. She might have said it, yes, but
15 I don't -- she seemed calmer, like she knew from her previous
16 one, so less pain than before, yes, but I don't know how I got
17 to that. Either she said or it just was obvious, cause the
18 first one was excruciating for her.

19 Q. And during the E.R. visit on Saturday January 26th
20 Kelly never expressed to any medical professional that she was
21 hot?

22 A. No.

23 Q. Never said I think I'm running a fever?

24 A. No.

25 Q. Never said, I've got chills?

1 A. No. She didn't have chills so, no.

2 Q. Never told anybody, I feel flush, I need to be re-
3 examined?

4 A. No, I don't recall her saying I need to be re-examined
5 or I -- she said to me when we got home, but there I don't --
6 I don't recall.

7 Q. And in fact she wasn't sweating while she was in the
8 E.R., was she?

9 A. Yes and no. She was flush, and when I got to the car I
10 noticed her sweating and -- right from the E.R. Now it was
11 cold, and well -- or chilly, you know January. Was she
12 sweating in the E.R., no, I don't recall that. I do recall
13 her sweating in the car, I do recall her looking a little
14 flush or peakish. I don't know if it was from the Dilaudid at
15 the time, or whatever, and then that's when she said she got
16 home she felt warm, and we took the first temperature.

17 Q. All right, and here in the car, right in the parking
18 lot, you are telling this jury that she was sweating; is that
19 right?

20 A. Yeah, she looked a little sweaty.

21 Q. But yet you didn't go back in the E.R., did you?

22 A. We had just left from there, they discharged us so, no.

23 Q. But this is a new something, a new symptom, is it not,
24 cause she wasn't sweating in the E.R..

25 A. Would a common person think leaving from the E.R., I

1 would think, no.

2 Q. But you're already testified it's January?

3 A. Well she looked warm and sweaty. It wasn't like she
4 was sweating profusely like she ran a marathon, but she looked
5 warm, and she looked like she was perspiring a little.

6 Q. It didn't bother you that she was perspiring a little
7 bit?

8 A. No, not at the time. I didn't -- you know, again, we
9 had just left the E.R.. I think it might have --

10 Q. All right, and you talk about the discharge
11 instructions that you received, and you've heard testimony
12 about what Dr. Law's typed discharge instructions were, that
13 there was -- was in his dictation?

14 A. Yes.

15 Q. And you had the dictated record that you -- or dictated
16 -- strike that -- the typewritten discharge instructions that
17 you took home with you?

18 A. The discharge instructions, yes, not the ---

19 Q. Okay, and you knew when you were up at the E.R. that
20 there was a potential that Kelly could become infected, didn't
21 you?

22 A. I knew when I left that if we didn't follow up with the
23 urologist in a timely fashion that there was a potential for a
24 problem. He made that expressly clear.

25 Q. In fact when you gave your deposition didn't you

1 testify, under oath, that Dr. Law told you that it was
2 important to follow up with the urologist, because if she
3 didn't there could be blockage which could result in
4 infection; isn't that you told us in your deposition?

5 A. Yes.

6 Q. Okay, then you knew that infection is a potential
7 complication, a potential problem?

8 A. If we didn't follow up. He said you should do it in
9 the next day or so, like Monday, you need to call Monday,
10 don't wait a week, two weeks cause she'll have problems.

11 Q. And in fact, that's why you were taking temperatures,
12 weren't you, cause you wanted to find out if she was going to
13 get a fever, if she was going to have an infection?

14 A. No, I took a fever because she said she said she was --
15 or I took a temperature because she said she was hot.

16 Q. Okay. So that's your reason as to why you took the
17 temperature?

18 A. Yes, and I think that's what I said in my deposition.

19 Q. All right, and you took that temperature how many times
20 on Saturday?

21 A. Three or four.

22 Q. And how many times on Sunday?

23 A. Probably about the same.

24 Q. Okay, and how many times on Monday?

25 A. I think once that morning.

1 Q. Okay, so that's nine temperatures you would have taken?

2 A. Okay, I'll agree with you, seven to nine, I mean ---

3 Q. Okay, why were you taking temperatures, nine times?

4 A. To see if it elevated any higher, to see something --
5 if it was alerting to that because she felt warm.

6 Q. Are you telling this jury that you did not know that a
7 temperature of a hundred and one was not a fever?

8 A. I knew that was warm to a fever. Did I know if it was
9 a emergent, no, like that's an urgent -- you're going right to
10 the hospital, you know, 102, 103 might be different, but a
11 101, I -- you know, I don't know.

12 Q. All right, you were asked about this daily dribble that
13 you did, and I think we've -- you've established that this was
14 done, so it's clear -- this is the second page of it -- this
15 is on the 27th at 1:15, okay; is that right? Is that what
16 you've established?

17 A. Correct, within -- and again, you guys are going by
18 times that you see. The server times could be different, but
19 I'll give you, it was that day.

20 Q. Okay, so Sunday at 1:15 P.M. ---

21 A. Sunday.

22 Q. ---This is what you have typed in, correct?

23 A. Correct.

24 Q. All right, if on this Sunday you've typed in -- and
25 you're talking about Saturday. You said Kelly was tired,

1 getting sick and running a high fever; isn't that what you
2 typed?

3 A. That's what I typed.

4 Q. So you knew on Sunday, at least by 1:15, that a
5 temperature of 101 is a high fever?

6 A. Well, I knew it was a fever.

7 Q. I mean, this is your words, isn't it?

8 A. Yes.

9 Q. Says high fever, not just a fever, it's a high fever?

10 A. It's a fever.

11 Q. Are you saying that these aren't your words?

12 A. I'm saying I put that out there for family members and
13 people; it's not my sworn testimony that you're trying to hold
14 me to. Did I write it, yes, did I mean it was a high fever, I
15 have no idea what I meant at the time, but I knew she had a
16 fever of 101.3 to 101.6, a fever.

17 Q. All right, and in 2002, you were 29 years old, I
18 believe?

19 A. Okay, twenty -- twenty-eight.

20 Q. Twenty-eight, and at this time you had already been in
21 the Army?

22 A. Yes.

23 Q. You already had an associates degree?

24 A. Yes.

25 Q. You had already been trained in CPR and rapid response?

1 A. CPR and basic first aid.

2 Q. Okay, basic first aid?

3 A. Yeah.

4 Q. And surely as a twenty-nine year old you knew that on
5 Sunday at 1:15, when she's got this high fever, that she needs
6 to be seen by a doctor?

7 A. I didn't know. Nobody expressly stated that.

8 Q. And I believe you've also talked about -- you said this
9 morning, meaning on Sunday morning, she woke me screaming;
10 isn't that you said, she's screaming?

11 A. Yes, screaming to wake me up, yes.

12 Q. And that she was shaking uncontrollably, isn't that
13 right? That's what you dictated, or that's what you've
14 written?

15 A. And I would, yes, she couldn't stop shaking on her own,
16 no.

17 Q. I mean ---

18 A. She was cold, having chills.

19 Q. And I believe you even said shaking uncontrollably.
20 This was something you'd never even seen before?

21 A. No.

22 Q. And that didn't scare you enough that you needed to go
23 in and see a physician?

24 A. That's why we called.

25 Q. Well we'll get to the call in a minute. And you also

1 talked about -- you have here again -- and she was -- and was
2 she ever, major fever, then major hot flash, then major fever
3 again, so she's still running this major fever that you've
4 quantified, you've classified as a major fever on Saturday and
5 on Sunday?

6 A. Again, as I testified before, her fever went from 101.3
7 to 101.6, so it didn't change between that, but I don't recall
8 it ever stopping and then coming back.

9 Q. And you're absolutely positive that temperature never
10 changed?

11 A. I recall, no. I do not recall it being 1.0 -- 101.3,
12 101.6, yes.

13 Q. Never was 103, 104, 105?

14 A. No, no, and that's what the odd part was.

15 Q. And you even though that's odd that it stays the same,
16 you still never went to see a doctor, did you?

17 A. No, we did not.

18 Q. Okay, and I believe you testified that the last pain
19 medicine that she would have gotten was at 5 A.M. that
20 morning, on Sunday morning, right?

21 A. No, I -- I gave her the medicine when I came home, and
22 then we went per prescribed, and as I recall from my
23 deposition, I still couldn't recall what the exact medicine I
24 was giving her, and Mr. Todd said roughly 5:00. It was
25 sometime that morning but I can't -- I mean, it's eight years

1 ago and you're -- you know, you're kind of trying to pin me to
2 the exact time and unfortunately I cannot remember because it
3 wasn't something to remember, when did you give her the one
4 pill, when did you give her the two pill, but I was giving her
5 medicine. Sometime Sunday morning we stopped.

6 Q. Okay, so sometime Sunday morning no more pain medicine
7 after that?

8 A. Correct, yes, ma'am.

9 Q. All right, and you testified that you would have given
10 her the pain medicine in accordance with the prescription?

11 A. Yes, roughly, yes.

12 Q. Okay ---

13 A. It would have been within accordance, yes.

14 Q. All right, and I believe actually in one of the blogs
15 you actually say that you were trying to be careful, you only
16 gave her one pill instead of two?

17 A. Uh huh (indicating positive)

18 Q. Is that right?

19 A. Whatever the low. If it says one or two I think I gave
20 her the low.

21 Q. What's the directions, what does it say?

22 A. Take one or two capsules by mouth every six hours as
23 needed.

24 Q. Okay, so every six hours, so she comes in at one, you
25 give her one pill -- that will be six hours later -- seven

1 P.M., that's another pill?

2 A. Okay.

3 Q. Then one A.M. is a third pill, right?

4 A. Uh huh (*indicating positive*)

5 Q. And then the next pill, the fourth one, will be seven
6 A.M., correct?

7 A. If you're going by those, yes.

8 Q. Okay, so when you said you gave it to her as
9 prescribed, right?

10 A. Up till Sunday morning, correct. Yeah, and I did, I
11 did give it to her as prescribed up till Sunday morning.

12 Q. Okay, and in fact, when we took your deposition didn't
13 you even say that you would wake her up to give her the
14 medicine?

15 A. That was probably the one A.M. pill, yes.

16 Q. How did you know she had pain?

17 A. I didn't. I was trying to make sure she wouldn't have
18 pain. She did tell me that she was, you know, about the same
19 pain overall, it wasn't getting any better, wasn't getting any
20 worse.

21 Q. All right, and I want to also talk about -- okay, let's
22 talk about that. So here in the night you are waking her up
23 to give her her pain medicine, and I think you even testified
24 to us that that's why you stayed up all night, is because you
25 were -- you were concerned about Kelly?

1 A. Uh-huh, yes.

2 Q. All right, but yet, weren't you really staying up to
3 work on this blog, I mean you've got entries at 3:55 in the
4 morning, 4:22 in the morning. Wasn't that what you really
5 were doing on Saturday, is working on this web site, trying to
6 get it up and running?

7 A. The web site had been up for years prior to that so,
8 no.

9 Q. You didn't say, my opening blog?

10 A. Correct, the web site had been up for years prior to
11 that, the blog was new.

12 Q. So you were working on your blog on Saturday?

13 A. No, you wouldn't post that many times in a day, but if
14 she's sleeping what am I -- you know, did you want me to sit
15 there -- I don't know -- but the web site had been up for --- I
16 mean there's no advertisements on it. I'm not getting
17 anything from it so, no, I wasn't staying up to work on that.

18 Q. All right, so you weren't staying up ---

19 A. Did I work on it, yes, but was I staying up to work on
20 it, no, not -- not the way you're inferring it at all. The
21 web site had been up for years prior to this.

22 Q. And I believe you've testified that on Monday morning -
23 - or actually probably that Tuesday, Kelly's stepdad, Tom
24 Meier, he came to you and he asked you why, what happened, did
25 he not?

1 A. I would assume so, yes. Right now it's -- okay.

2 Q. Okay, did you have lots of people asking you what
3 happened?

4 A. Yep, I did.

5 Q. Why did you do that, why did you do that?

6 A. Lots of ---

7 Q. Did you have people questioning you?

8 A. Not so much questions, I mean just wanting to know what
9 happened overall, how did somebody die from a kidney stone.

10 Q. But yet, you didn't put anything on this Sunday entry
11 about you calling the E.R., did you? Is there anything in
12 this blog that talks about you making the call to the E.R.?

13 A. There's nothing that talks about me calling, there's
14 nothing that talks about the -- the urinalysis, I mean, I left
15 a lot of stuff out. The goal was, again, -- it's great to look
16 back now and say well, hey, you're suing now, but I mean at
17 the time I'm just trying to say, hey, what's going on with
18 their family so, no.

19 Q. Okay, so you didn't say anything in there. And I
20 believe in Defendants' Exhibit 3 what I did was, I got all of
21 your blogs from this opening blog up through the end of
22 February. And let me ask you, what time is this one posted,
23 just say the date and the time?

24 A. The 25th.

25 Q. Of February?

1 A. Correct.

2 Q. And that's at one A.M.?

3 A. Correct.

4 Q. Okay, so February the 25th -- that's over a month after
5 she died ---

6 A. Uh huh (indicating positive)

7 Q. ---What is that blog entitled?

8 A. "What happened".

9 Q. What happened, so this is -- it's taken you a month of
10 people questioning you, wanting to know what happened, before
11 you finally give a blog, do you not?

12 A. Not the way in your --

13 Q. Or that you give an explanation, because actually there
14 are twenty-one blogs from this blog until this blog before you
15 ever tell anybody what happened?

16 A. Correct.

17 Q. All right, and in this blog ---

18 A. That would be her birthday which is probably why.

19 Q. All right. Well, we'll talk about this particular
20 blog. On this one that you did in February you talk about, at
21 10:30 in the morning, on Sunday morning Kelly woke me?

22 A. Uh huh (indicating positive)

23 Q. Now you just testified earlier she woke you at 8:30?

24 A. Correct.

25 Q. But here in the blog you said 10:30?

1 A. Correct.

2 Q. So on the blog you say 10:30, and you say again, she
3 was screaming?

4 A. With the chills, yes.

5 Q. Yeah, bad chills, and that you covered her up with five
6 blankets, you sat on her -- sat with her to try to warm her
7 up, fifteen minutes or so the chills stopped?

8 A. Yes.

9 MR. FOSTER: Your Honor, objection, this is
10 argumentative and compound.

11 THE COURT: Overruled, Counsel. We'll give you
12 redirect on these issues if you wish.

13 MR. FOSTER: Thank you, Your Honor.

14 THE COURT: Thank you.

15 Q. And you also mention that she was burning up, said she
16 had chills, she's screaming, she's burning up, and then you
17 say at noon she has chills again?

18 A. Okay.

19 Q. Okay, all right. Now she's got chills, and then you
20 break down here. You start talking about, she's had the
21 chills, and then you say, Kelly being Kelly, had to take a
22 shower, so she takes a shower, and then you talk about how,
23 around that time she told me she was feeling better, so after
24 the shower she felt better, correct?

25 A. According to that, yes.

1 Q. Okay, so this was written in February, 2002.

2 A. On her birthday.

3 Q. You're testifying now in 2010?

4 A. Correct.

5 Q. You know, this would be more accurate, would it not?

6 A. Not necessarily, no.

7 Q. You don't write accurate things on a blog?

8 A. There's no reason to, no, I don't have to. Would I
9 like to be as accurate as possible, certainly, but that's also
10 Kelly's birth date, and if you watch all the blogs I'm going
11 back and forth with a lot of things, so I mean, it's easy to
12 look back now and say, what's here, but I'm sticking with what
13 I testified with because that's what I recall as I sit there
14 and try to recollect. Here I'm just trying to blot stuff down
15 so people have some answers that are immediate friends. I'm
16 not trying to, you know -- I'm trying to put it all together
17 as fast as I can. Again there's a lot going on. It just --
18 it looks so much easier now to go back eight years and say,
19 well you're off an hour here, you're off two minutes here. It
20 would be nice if I could do that, but unfortunately I can't.

21 Q. So were you trying to lie to her family and friends as
22 to what happened?

23 A. I've never tried to lie, I mean you're trying to infer
24 that by saying that I'm off an hour here and an hour there. I
25 mean, I'm trying to just tell you what happened, and you're

1 trying to bring this up that -- I mean I'm as close as I can
2 at the time on her birth date. I'm a little emotional. If
3 you look at all the blogs they go back and forth, I'm happy,
4 I'm sad, I'm mad, I'm angry, lots of things, and the same
5 thing here. I don't know why I'm off on the time, but I'm off
6 on the time, I'm pretty consistent with stuff that I'm
7 saying. Again to a layperson thirty minutes is thirty
8 minutes, to you it seems like two hours but, you know, I'm
9 trying to be as close as I can but I don't know what you're
10 trying to get out of that other than I was a little off a
11 month after she died, on her birthday. I apologize.

12 Q. In this blog you talk about 10:30 waking up ---

13 A. Uh huh (**indicating positive**)

14 Q. ---Screaming, bad chills, burning up. At noon having
15 chills again ---

16 A. And that would ---

17 Q. ---Then having a shower, her feeling better, and then
18 you call the E.R.. That's different than what you testified,
19 isn't it?

20 A. Correct, because Chad and Laura Casselman were there
21 roughly -- shortly thereafter, but it wasn't anywhere near her
22 chills.

23 Q. And you testified to this jury earlier that it was at
24 8:30 ---

25 A. Yes.

1 Q. ---That all this happened?

2 A. Yes.

3 Q. That you called the E.R. around 10 or 10:15?

4 A. Did I mention Chad and Laura coming in in that blog?

5 Q. I don't think you do. I mean it would have to see for
6 itself, but I don't think that you talk about them coming in.

7 A. I mean that's also something I didn't blog about but
8 that still happened around the same time so --

9 Q. But what I'm trying to get straight is, your earlier
10 testimony is -- you've got -- actually I'll just write it up
11 here, it's probably easier. So your first testimony is, at
12 8:30 wake up, she has the chills ---

13 A. Yes.

14 Q. ---Screaming, at 10 or 10:30 you call the E.R.?

15 A. Yes.

16 Q. She then takes a shower, feels better, and don't come
17 back -- and ya'll don't go to the E.R.?

18 A. Correct.

19 Q. But in your blog you say everything starts at 10:30,
20 she wakes up, again you do talk about the chills, you talk
21 about the screaming, but in your blog you say she takes the
22 shower, she feels better, and then you call. Do you see all
23 this? This is different than what you testified? That's what
24 I'm trying to understand, why there's discrepancy in what you
25 wrote in 2004, in February, a month after she died, and what

1 you're testifying in 2010 ---

2 A. I'm sorry, in 2002.

3 Q. Yeah, I'm sorry, 2002. What you write in 2002 ---

4 A. Uh-huh.

5 Q. ---A month after she dies, as compared to what you
6 testify in your deposition in 2004, and what you're telling
7 this jury in 2010?

8 A. Okay, so I'm the same with my deposition. I don't know
9 what you're saying. You just kind of ---

10 Q. I'm trying to understand, why is there discrepancy ---

11 A. You just said I kind of -- or were three wrong. What -
12 - I mean, what did you say? I didn't hear the question. You
13 kind of were just rambling, testifying. I didn't ---

14 Q. My question to you is why is there a discrepancy?

15 A. Because I was mistaken then on -- you know, I don't
16 know what the associated time frame is to get over the death
17 of my spouse, but as I'm dealing with this it's obviously a
18 rough thing and I made a mistake. I don't know.

19 Q. So everything that you're telling the friends and
20 family that was a mistake?

21 A. Or incorrect. I mean it's not -- it happened, It just
22 maybe not happened in that order at that exact time frame.

23 Q. And I think you were asked the question, did you look
24 up anything on the internet about kidney stones, and you said,
25 no. Did you look up anything on the internet, at this point

1 in time, on Sunday, January the 27th -- did you look up
2 anything about somebody who wakes up with shaking
3 uncontrollably, chills, high fever?

4 A. I don't recall, no.

5 Q. But that's something you -- I mean, you were really
6 adept at getting on the web and understanding things on the
7 internet, weren't you?

8 A. Yes.

9 Q. But you didn't have any questions that you wanted to
10 type in or google or anything like that?

11 A. I did not, no. I didn't -- I didn't do that, no.

12 Q. And I think you talked about -- your testimony was, we
13 decided not to go. I think the question was -- maybe it was
14 from Mr. Todd. He asked you what did that mean as far as we
15 decided not to go, and you tried to differentiate a little
16 bit, and you said, well that was Kelly deciding not to go.

17 A. He didn't say we. He said you decided, and I didn't
18 want -- that's what he said.

19 Q. Okay, well that's what I don't understand?

20 A. Sure.

21 Q. And you also decide she didn't need to go to the E.R..

22 A. I mean we would have made it collective, but I didn't
23 decide for her not to go to the E.R. She said she felt better
24 and she did not ---

25 Q. She said she felt better?

1 A. Yes. She said she felt better, and didn't feel like
2 going to the E.R. right then, and we wait to see if it
3 happened again.

4 Q. Now, on Monday -- you testified that Kelly woke up at
5 8:30, she took a shower, you were talking to her, she was
6 fine, but she was sleepy so you let her go stay on the couch.

7 A. Yes.

8 Q. And you went to work?

9 A. Yes.

10 Q. And the work that you went to was the work with Chad
11 Casselman, right?

12 A. Correct, yes.

13 Q. That was your boss?

14 A. Yes, correct.

15 Q. And tell the jury what exactly kind of work you were
16 doing for Chad Casselman?

17 A. Web master for Sands and Legends Resorts.

18 Q. Okay, and by working on web master, that kind of stuff,
19 isn't that something you could have done at home?

20 A. No. I mean I -- the files are there, some of the
21 programming would have been there, mainly the files and stuff
22 that I needed, I mean would have been there. I was still a
23 new employee so potentially I could have in the future if I
24 had prepared for it but I wasn't prepared as a new employee.
25 I couldn't remote in.

1 Q. But Chad, he was your best friend, wasn't he?

2 A. He was a good friend, yes. I wouldn't say my best, but
3 he's a good friend, yes.

4 Q. And if you needed to stay home with your wife he would
5 have let you stay home, wouldn't he?

6 A. I don't know, I didn't ask because I'm a new employee.
7 I didn't have any sick time or anything like that. I don't
8 know if I did, I can't remember.

9 Q. All right, and you testified that that morning you
10 called Dr. Young's office, not Kelly. There was nothing that
11 prevented Kelly from calling the office, isn't that right?

12 A. Correct, yes.

13 Q. But when you called the office you simply were asking
14 about the appointment.

15 A. Yes.

16 Q. You never said anything to the receptionist, secretary,
17 whoever it was -- you never told them anything about Kelly's
18 symptoms, did you?

19 A. No, I did not.

20 Q. And on Monday morning your testimony is that Kelly did
21 not have any nausea and vomiting; is that right?

22 A. On Monday morning?

23 Q. Yeah, Monday morning?

24 A. I don't recall any, no. I don't recall any nausea or
25 vomiting. I mean I don't recall any ---

1 Q. You testified ---

2 A. Yeah, okay.

3 Q. ---That she didn't have any nausea or vomiting. You
4 said she looked fairly normal on that Monday morning.

5 A. A little -- yeah, she did. She looked fairly normal, a
6 little flush, a little tired, but she was Kelly, I mean she
7 was --

8 Q. And you took her temperature right before you left, and
9 it was still 101.3 or 101.6?

10 A. Yes, correct.

11 Q. Any reason why you didn't call Laura Casselman to come
12 check on your wife?

13 A. No.

14 Q. Even though she's your friend who had been there that
15 weekend ---

16 A. Uh-huh.

17 Q. ---Actually the day before, but you didn't feel like
18 wanted her to come check on her?

19 A. I don't know what -- no, she would have been the only
20 one but, no.

21 Q. But you were calling, you couldn't get a response, and
22 you called those three times, correct?

23 A. Correct, yes.

24 Q. But you didn't feel like you needed anybody to come and
25 check on her?

1 A. I thought she was sleeping. That's what -- she went to
2 go take a nap. She was tired, she had been -- no.

3 Q. I ask you on this web page -- and again, this is from
4 Sunday, January 27th, 2002, at 1:15, you reference a word
5 here. You say "lazy bastard".

6 A. Uh-huh.

7 Q. Who were you referring to?

8 A. Dr. Young.

9 Q. Are you in the habit of calling medical professionals
10 derogatory terms?

11 A. In the habit of it. When I'm upset, he didn't want to
12 come in, I mean, yeah, you know, being mind of critical there.

13 Q. This is somebody you had never met, you never talked
14 to, but you were calling him a lazy bastard?

15 A. Yes. That's what I posted, yes.

16 MS. SCALISE: That's all I have, thank you.

17 THE COURT: All right, ladies and gentlemen, when we
18 have a presentation of a witness we have direct and then
19 cross, then we go back to the proponent to see if any new
20 issues are brought up during cross, and the -- if so, Counsel
21 is given an opportunity to question on those new issues.

22 Is there any redirect?

23 MR. FOSTER: Yes, Your Honor, just briefly..

24 THE COURT: All right, please proceed.

25 MR. FOSTER: Beg the Court's indulgence one moment,

1 A. Three or four times.

2 Q. Can you show me where that's documented in here, three
3 or four times?

4 A. I don't see where it says that at all that he came in.

5 Q. Did you ever see it in any of the nurse's notes?

6 A. Not that I recall, no.

7 Q. Does that mean it didn't happen?

8 A. No, I mean -- yeah, correct, yeah. H did come in so,
9 yeah, I mean ---

10 Q. Now, when ya'll were leaving the hospital, Sean, and
11 you said she looked a little flushed, and she had a little, a
12 little sweat on her face, do you know whether or not that was
13 from the drugs or from -- from -- or do you know what that was
14 from?

15 A. No, not at all.

16 Q. Let me ask you this, when you were leaving -- when you
17 had just -- when you had just walked out of the emergency room
18 at South Strand did you trust Dr. Law and the nurses there,
19 and anybody that Dr. Law might have consulted with, to have
20 treated Kelly properly?

21 A. Yes.

22 Q. Sean, were you in any position to ask these doctors or
23 tell these doctors what to do, or what they ought to be doing?

24 A. No, cause I don't have any training or medical
25 background in that. I mean, Dr. Law seemed compassionate

1 THE COURT: Counsel, I'm going to sustain that. What
2 issue on that point was brought up in direct?

3 Sustained. Please move to your next question.

4 Q. Sean, did you know a lot about computers?

5 A. Yes.

6 Q. Did you routinely go on and do medical research on
7 computers?

8 A. Not normally, no.

9 Q. Did you ever?

10 A. Before then, no. Last time when -- was with my mother,
11 diagnosed with leukemia, and I looked on that, but that's been
12 several years.

13 Q. That was after Kelly passed?

14 A. Yes, after Kelly passed.

15 Q. Sean, on Saturday after you left the E.R., on Sunday
16 and, even early Monday morning, was there anything that gave
17 you -- let me rephrase that. Saturday, on Sunday after the
18 phone call to the hospital, and even on Monday morning, was
19 there anything -- was there anything that gave you any reason
20 to believe that Kelly had anything other than a kidney stone,
21 a simple kidney stone?

22 A. No.

23 Q. Let me ask you this in that regard. When you were at
24 the hospital you said Dr. Law came in and talked to you about
25 the x-ray; is that correct?

1 **THE COURT:** All right.

2 Q. Sean, before you left the E.R. did they ever -- did Dr.
3 Law or the nurses, or anybody at the hospital, ever tell you
4 that this kidney stone was an obstructing kidney stone?

5 A. I do not recall him saying it was an obstructing kidney
6 stone, no.

7 Q. Did they -- before you left the hospital did any of the
8 nurses or doctors ever tell you that, not only was it an
9 obstructing kidney stone, but that it was obstructing to the
10 point that she was leaking urine out into her retroperitoneal
11 cavity?

12 A. They most definitely didn't say that, no.

13 Q. Did they tell you she was leaking urine at all ---

14 A. No, they didn't say that.

15 Q. ---Into her body?

16 A. No.

17 **MR. FOSTER:** That's all I have.

18 Thank you, Your Honor.

19 **THE COURT:** Very good. Thank you, Counsel.

20 All right, you may step down, Mr. Fay. Thank you.

21 All right, ladies and gentlemen, we've reached the end
22 of our day. Let me tell you two or three things before we
23 quit for the day. First of all tomorrow morning ---

24 Ms. Chestnut, you are our first draw alternate, all
25 right. I'm going to shift down and sit tomorrow morning in

1 that we've made that allowance, and we'll see that back
2 tomorrow morning, and we'll put it in evidence at that time.

3 Anything further before we close for the day?

4 MR. AIKEN: Yes sir. Can you give the lawyers one
5 minute about the scheduling issue we talked about right before
6 lunch, to see if Mr. Foster has made a decision on that.

7 THE COURT: All right, why don't we do that off the
8 record ---

9 MR. AIKEN: That's fine.

10 THE COURT: ---So that we'll just stand down here and
11 people wish to leave they're welcome to do so. But we will
12 adjourn these proceedings for the day, this courtroom, and our
13 staff, till nine o'clock in the morning, but this case till
14 ten o'clock in the morning. Court's adjourned.

15 (THE FOLLOWING TAKES PLACE ON THE NEXT DAY, MAY 19,
16 2010, OUTSIDE THE PRESENCE OF THE JURY.)

17 THE COURT: We're back in the matter of Fay v. Grand
18 Strand, and I'm told that there is at least one issue that the
19 Defendant Young wishes to place on the record.

20 MS. MAGEE: Yes, Your Honor. Yesterday you made your
21 ruling on a motion in limine, after the opening arguments,
22 regarding the adultery issue ---

23 THE COURT: Yes..

24 MS. MAGEE: ---And we kind of just rolled right into
25 Sean Fay's testimony ---

1 **THE COURT:** We did.

2 **MS. MAGEE:** ---And I just wanted to make sure that the
3 record is protected, that we still would want to argue that.
4 We understand your ruling, but just want to make sure, you
5 know, for the record, that we want to argue that. We think
6 it's admissible for purposes of Mr. Fay's credibility. That
7 an issue in the case. And I'm not sure what the family and
8 friends will testify to today. There was some testimony in
9 their dispositions about their opinions on their marriage,
10 that it was fantastic, that Kelly was the love of his life,
11 and we think that, if any of that does come out today and
12 we're not allowed to go into what happened with regard to the
13 adultery, that would be prejudicial to us.

14 **THE COURT:** Well, first of all, the ruling that I made
15 on the motion is always subject to the door being opened to
16 change that ruling. Of course that's just standard procedure.
17 I think in any case that you can always open a door, and
18 that -- I would caution Plaintiffs to be aware of that. I
19 know they are aware before I even say that, that but the Court
20 declines to change its ruling at this time for the reasons
21 stated, but notes your objection.

22 **MS. MAGEE:** Okay. Thank you, Your Honor.

23 **THE COURT:** All right, anything else?

24 **MR. FOSTER:** Your Honor, can I clarify that just for
25 obvious reasons. I mean, obviously these -- some of these

1 what the circumstances, are and it's a -- a threshold that is
2 subject to argument. I would just say to you, you just have
3 to be careful with how you approach these witnesses on this
4 comment. It's one thing to talk about a relationship, it's
5 another to talk about, you know, a person's -- just, you know,
6 their -- their life and what it meant generally to their
7 community or to whatever. Counsel, I can't do -- I can't pose
8 your questions for you. I just have to leave it with you, and
9 cannot give you anything further than that at this juncture.

10 MR. FOSTER: Thank you, Your Honor.

11 THE COURT: All right. Mr. Todd.

12 MR. TODD: Just one thing, Your Honor -- and this will
13 be very brief, is to make an offer of proof. There was a
14 joining exhibit proposed, Exhibit Number 6, which was Cape
15 Fear Behavioral Health Records, which reference the affair.
16 We would just -- to make an offer of proof we would make that
17 a Court's Exhibit, the Cape Fear records, which were Exhibit
18 Number 6, I believe, that was not introduced into evidence.

19 THE COURT: All right, that would be fine.

20 And, Counsel, we had talked about redacting that, was my
21 understanding but I -- however the parties wish to resolve it
22 is fine.

23 MR. TODD: I think they withdrew all those records.

24 THE COURT: All right.

25 MR. FOSTER: They did. Those were Dr. Kommu's records

1 Nitrite is a test that's used to look for certain types
2 of bacteria, if they're present in the urine. Some bacteria
3 will form this product nitrite, by an enzyme that they have.
4 So this was noted to be negative. And then the leukocyte
5 esterase was also noted to be negative. Leukocyte esterase is
6 an enzyme that's present in white blood cells, so a leukocyte
7 is a white blood cell. It's the cell that's been used to
8 fight infections and inflammatory cells. If the leukocytes
9 are present they contain this enzyme that's leukocyte
10 esterase, which will make the little stick -- dip-stick that
11 you put into urine change color. So this was negative.

12 So this was in the emergency room on Saturday morning.

13 Two days later at 2:07 P.M. the emergency medical
14 services respond. This is the time from their documents
15 prepared when they arrived at Ms. Fay's house, and the note
16 said that Ms. Fay was on the floor, she was hot to touch, she
17 was cyanotic. Cyanotic is a blue color you get when you're
18 not breathing normally. If you don't have enough oxygen in
19 your blood you develop a blue tinge. And she had shallow
20 rapid respiration. What this would be, instead of a normal
21 rhythmic regular, she was breathing just fast, and less than
22 normal depth of breathing, and the husband, it's noted in this
23 record, said that Ms. Fay had been febrile last night, so she

1 was taken to the Grand Strand Regional Medical Center where
2 she was diagnosed as having septic shock, and I'll explain
3 some of these terms in upcoming slides.

4 This time now her body temperature was a hundred and
5 five, which is very elevated. Her blood pressure was very
6 low. Normal would be, you know, you always hear one twenty
7 over eighty, so this was low. Her heart rate was very fast at
8 one thirty-three, and these are the data taken at 5:30 P.M.
9 when she was at the hospital.

10 The other thing that I noted was that the urinalysis
11 now, once she gets to the hospital, is different from what she
12 had had when she was at the emergency room. Her pH now --
13 before it was five-point-o -- now it's six point five, so it's
14 gone up. The pH has changed. You know, it can vary some, but
15 I'll come back to why that is of importance in this autopsy.

16 Now, she was noted to have blood in the urine. Her
17 nitrite was still negative but now her leukocyte esterase, the
18 mark of inflammatory cells had turned from negative to
19 positive. These little strips we use to test urine change
20 color either negative or positive, and examination of the
21 urine showed that she had lots of white blood cells present,
22 which is the explanation for why this test was positive.

23 Cultures were done and the cultures when you grow -- you
24 take the urine or the blood, in this case both, and you put it
25 onto different what we call culture media. It's just

1 different ways of growing things. It's like generally when
2 you're farming or gardening and stuff, there's different types
3 of fertilizers. There's some bacteria like one type of
4 fertilizer, some like others, so in the lab it's put onto
5 different culture media and both accrue out proteus mirabilis,
6 which is a type of bacteria, and the importance of this is
7 that this bacteria tends to change the pH of the urine, so
8 that's the explanation for this pH going up.

9 And then at 10:00 P.M. that night, she -- Ms. Fay died,
10 and the clinical record had the impression that she died from
11 overwhelming sepsis with septic shock, so just to refresh,
12 because I've mentioned how the two urine samples, urinalyses
13 differ, I've prepared this one just so you could see side by
14 side that first the pH was five, then it went up to six point
15 five.

16 The blood was negative when she was in the emergency
17 room, was positive on the -- when she was admitted to Grand
18 Strand Regional Medical Center. Nitrite stays negative, but
19 the leukocyte esterase which was negative in the emergency
20 room now is positive and confirmed by the presence of the
21 white blood cells in the urine.

22 So the questions that I posed to myself, this is a
23 mental thing. This is when I'm framing, trying to frame the
24 puzzle. I -- the question came up -- I had read the autopsy
25 report. I wanted to confirm was the cause of death septic

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS

2 COUNTY OF HORRY) (08-CP-26-9047)

) (08-CP-26-9368)

3 SEAN D. FAY, as Personal)
4 Representative of the)
Estate of Kelly L. Fay,)
5 deceased.)

TRANSCRIPT OF RECORD

6)
7 GRAND STRAND REGIONAL) May 17, 18, 19, 20, 21, 2010
MEDICAL CENTER, LLC, dba) May 24, 25, 26, 27, 28, 2010
8 SOUTH STRAND AMBULATORY) Conway, South Carolina
CARE CENTER, et al)

9
10 B E F O R E:

11 HONORABLE J. MICHAEL BAXLEY, Judge; and a jury.

12
13 A P P E A R A N C E S:

14 RUSKIN C. FOSTER, ESQ.
BRADLEY HEWITT, ESQ.
15 ATTORNEYS FOR PLAINTIFF

16 MONTEITH P. TODD, ESQ.
RANDOLPH L. LEE, ESQ.
17 ATTORNEYS FOR DEFENDANTS, GRAND STRAND

18 J. BOONE AIKEN, III, ESQ.
ATTORNEY FOR DEFENDANTS, LAW AND CAROLINA HEALTH

19 MARIAN SCALISE, ESQ.
LYDIA L. MAGEE, ESQ.
20 ATTORNEYS FOR DEFENDANT, YOUNG

21
22 DIXIE COX EUBANK
CIRCUIT COURT REPORTER
23 FIFTEENTH JUDICIAL CIRCUIT

24
25 VOLUME 3 OF 8
(SEE VOLUME 1 FOR INDEX)

1 If this was the case where I had no clinical information and
2 you asked me how long that infection had been present, I would
3 state one day.

4 Q. Okay, and we're going to get into that in real detail
5 in a little while, all right, ---

6 A. I am not surprised.

7 Q. --- I promise you, but on your first slide, Dr. Proia,
8 on your first slide, don't you say sudden onset of right flank
9 pain about one and a half hours ago?

10 A. Yes sir.

11 Q. That's on your first slide, isn't it?

12 A. Yes, that's from the medical record.

13 Q. Okay, that's on the medical record. That was from what
14 Dr. Law dictated at some point in time, correct?

15 A. I, I guess, yes. I took it and I assume it was his
16 dictation.

17 Q. Okay. Well, let me ask you this; you took it from his
18 dictation?

19 A. Yes.

20 Q. All right, and I'm going to show you his dictation and
21 doesn't it say in there that she -- the pain began one and a
22 half hours ago in his dictation?

23 A. That's what it says under HPI.

24 Q. Yes sir, okay. Now, right here it says pain right
25 flank pain beginning approximately one and a half hours ago,

1 correct?

2 A. Yes sir.

3 Q. Okay, but she also presented with abdominal pain and
4 back pain and those were chief complaints, were they not?

5 A. That's what he listed, yes sir.

6 Q. Okay, and that's because the flank is part of the
7 abdomen, correct?

8 A. Yes.

9 Q. And she had pain that radiated around to her abdomen,
10 did she not, to the periumbilical area?

11 A. That's what it says, yes sir.

12 Q. Okay, but if she had abdominal pain, flank pain, and
13 back pain, or back pain and flank pain, they're all basically
14 the same?

15 A. To me, yes.

16 Q. Okay. Now, did you bother to read, Dr. Proia, the
17 handwritten records other than -- other than what Dr. Law
18 type- wrote at some point in time, did you read these records,
19 ---

20 A. Yes, I read ---

21 Q. --- her triage records?

22 A. Yes, I read off of that.

23 Q. Okay. Did you see where the triage record said she
24 complained of flank pain one-half hour ago?

25 A. I saw that, yes.

1 has raised their hand.

2 And you will recall at the end of the day we had --
3 actually yesterday had stopped and allowed a defense witness
4 to proceed, although that was in -- not part of the
5 Plaintiff's case, but happened during the Plaintiff's case.
6 We still remain in the Plaintiff's case so, Mr. Foster, please
7 call your next witness.

8 **MR. FOSTER:** Thank you, Your Honor.

9 Your Honor, the Plaintiff would call Dr. Charles W.
10 Sheppard, please.

11 **THE COURT:** Please come forward and take the oath of a
12 witness.

13 **CHARLES W. SHEPPARD, M.D.,** being
14 first duly sworn, states as follows:

15 **DIRECT-EXAMINATION BY MR. FOSTER:**

16 Q. Good morning, Dr. Sheppard.

17 A. Good morning.

18 Q. Dr. Sheppard, I'm going to let you introduce yourself
19 to the jury in just a little bit and then I'd like to hand you
20 your C.V. Would you just tell the jury who you are, where
21 you're from, and what you do for a living.

22 A. I'm Charles Sheppard, Chuck Sheppard. I'm from
23 Springfield, Missouri, and I work in the emergency department
24 at St. Johns Regional Health Center in Springfield, also the
25 Medical Director for our helicopter flight program.

1 Q. All right, sir. I'm going to hand you a copy of a
2 document; do you recognize that?

3 A. Yes sir.

4 Q. What is that?

5 A. That's my current C.V.

6 Q. All right, sir. Would you sort of go through and
7 briefly explain to the jury your education and your work
8 experience.

9 A. It's going to take a while cause I'm old, but ---

10 Q. Okay; that's all right.

11 A. I started with an undergraduate degree in engineering
12 physics from Cornell. Then I went to the University of
13 Missouri Medical School; I got an M.D. degree, graduated in
14 1971, went to San Francisco and did an internship, what was
15 called a rotating internship in those days, then I did an
16 internal medicine residency, and in between those two I worked
17 at the Haight Expert Free Medical Clinic as their medical
18 director for two years. Then I went to North Adams,
19 Massachusetts, had an office of internal medicine, and then
20 became their first full-time emergency department director. I
21 worked there until I moved to Ohio.

22 We lived in Ohio one year and then my wife said she was
23 going back to New England, so I left and went back to Upstate
24 New York and worked in a hospital there and then in 1992 we
25 moved to Springfield, and I've been working full-time in the

1 emergency department at Springfield since.

2 Q. All said and done, all total how long have you worked
3 in the emergency room as a emergency room physician, Dr.
4 Sheppard?

5 A. We'll, I've actually worked part-time in the emergency
6 room from 1972 and then I've been full-time since 1982, so
7 that's twenty-eight years.

8 Q. Twenty-eight years?

9 A. Yeah.

10 Q. All right, and are you board certified? Did you tell
11 them when you were board certified in any area of medicine?

12 A. I did not. I'm board certified in internal medicine
13 and board certified in emergency medicine.

14 Q. All right, sir, anything else?

15 A. No. sir.

16 Q. All right. Now, during those twenty-eight years, did
17 you say, ---

18 A. Yes sir.

19 Q. --- Dr. Sheppard, have you had the opportunity to work
20 with, around, and direct, and when I say direct, I mean give
21 orders to emergency room nurses?

22 A. Yes, sir.

23 Q. Do you feel as though you know the standard of care not
24 only of an E.R. physician treating a kidney stone patient, but
25 as well as nurses in the emergency room only treating kidney

1 stone patients or any other kind of patient in the emergency
2 room?

3 A. Yes sir.

4 Q. And is that based on your experience and training?

5 A. Yes sir, and obviously we work emergency medicine to
6 team sport. We work with the nurses all the time and we work
7 together, and I have a very good feel for what they should do.

8 Q. Okay, have you ever had occasion to teach emergency
9 room nurses?

10 A. Yes sir. I mean I give lectures to the nursing staff
11 and they're included in a lot of the conferences that we do as
12 well.

13 Q. All right. Have you ever testified in any other court
14 as to -- as to the standard of care of nursing?

15 A. No, sir.

16 Q. All right, and do you understand that the laws of each
17 state are different?

18 A. Yes sir.

19 MR. FOSTER: Your Honor, at this time we'd offer Dr.
20 Sheppard as an expert in the field of emergency medicine and
21 in the very narrow field in the standard of care of nursing
22 only as it applies to the E.R.

23 THE COURT: All right. Are there questions from
24 Counsel concerning the designation?

25 MR. AIKEN: I have no questions with regard to his

1 emergency room status.

2 MR. LEE: No questions at this point, Your Honor,

3 THE COURT: And none ---

4 MS. SCALISE: Your Honor, my understanding, he's not
5 going to be testifying against Dr. Young.

6 THE COURT: Very good.

7 MR. FOSTER: He's not going to be testifying to the
8 standard of care of a urologist, Your Honor.

9 THE COURT: All right, is there objection then from the
10 parties that are involved to the designation of the expert?

11 MR. AIKEN: No sir, not me. Thank you.

12 MR. LEE: No, Your Honor.

13 THE COURT: All right, very good. Then you may
14 proceed. So ordered.

15 MR. FOSTER: Thank you, Your Honor.

16 Q. Dr. Sheppard, do you recall way back when you were
17 first involved in this case?

18 A. Yes sir. It was in late 2005, I believe, when first
19 contacted.

20 Q. And did I -- did our office contact you and ask you if
21 you would review these records and give some opinions as to
22 whether or not you thought that Kelly Fay had received
23 appropriate care in the emergency room at South Strand?

24 A. Yes sir.

25 Q. All right, and in that regard, Dr. Sheppard, did you

1 review the medical records?

2 A. Yes sir.

3 Q. And did you review the medical records of South Strand,
4 and Grand Strand, all the medical records that were sent to
5 you?

6 A. Yes sir.

7 Q. Did you review the depositions?

8 A. Yes sir, not all the depositions, but the ones you sent
9 me.

10 Q. Okay, and did you also review Sean Fay's blog as to --

11 A. Yes sir, or at least ex- -- what was described as
12 excerpts from his blog.

13 Q. Okay, and have you reviewed the films in this case?

14 A. No, sir.

15 Q. Okay, and anything else you can think of you reviewed?

16 A. No, sir.

17 Q. All right. Did you ultimately form any opinions in
18 regard to the care that Kelly received in the emergency room?

19 A. Yes sir. I felt the care she received was below the
20 standard of care.

21 Q. Okay. Dr. Sheppard, if you would, would you explain to
22 the jury, and I don't have really room in this courtroom to
23 stand and get you to look at the jury, but I -- I've talked to
24 you before and I kind of understand where you're going, but I
25 really need -- the jury needs to know. Would you explain to

1 them, and let's start at, you know, at the very beginning and
2 explain to them what your opinions are in this case in regard
3 to the care that she did receive.

4 A. Well, there as we talked about, there's only a couple
5 of things that are really true life-threatening urologic
6 emergencies. One is a kidney stone with an infection behind
7 it or an infected kidney behind this stone because that's
8 essentially an abscess of the kidney, so it's important
9 whenever you have a patient with a kidney stone you need to do
10 everything you can to rule that out because that's the one
11 thing that can kill you, certainly cause the loss of a kidney,
12 and so it was my feeling that -- that the work-up to determine
13 that was not done in this case. I mean, part of it was done,
14 but it was not done and based on the reports I had, this was a
15 high risk patient for having that kind of problem.

16 She had a big stone; it was a very proximal stone, that
17 is it was close to the kidney. It had not traveled very far
18 down and ---

19 Q. Dr. Sheppard, before you -- before you do that and I
20 hate the interrupt your train of thought, but can you -- could
21 you possibly draw a picture for the jury of the kidneys, the
22 ureter, and the bladder so that they can see exactly what
23 you're talking about?

24 A. He's never seen me draw, but I'll do my best.

25 Q. Okay. You know what, you don't have to be an artist.

1 Q. Do you have an opinion to a reasonable degree of
2 medical certainty more likely than not whether or not that
3 stone was going to pass?

4 A. More likely than not it's not going to pass.

5 Q. Okay.

6 A. It probably has a, you know, a fifteen to twenty
7 percent chance of passing so that's way less likely than not,
8 so you've got a patient with a very proximal kidney stone
9 unlikely to pass. Therefore, this is a patient that you have
10 to worry about the unusual complication of an infected kidney
11 behind the stone because if you think about it, the kidney
12 produces urine all the time. If it's blocked and the urine
13 can't get out, that causes pressure against the kidney and
14 causes the kidney to swell and makes this a set-up for
15 infection to grow.

16 You've got this pool of collected urine; urine is a very
17 good culture media, not the best but it's a good one, so you
18 have to worry about that, so in this kind of a case you need
19 to do everything you can to be sure that the kidney is not
20 infected or that there's no infection and the things you can
21 do for that are a urinalysis, a white blood count, and a
22 temperature, temperature probably being your best one because
23 if you've got a fever you've almost certainly got an infection
24 and that becomes a urologic emergency.

25 That's something that needs to be admitted, strong

1 Q. Respiration rate?

2 A. Yes sir.

3 Q. Her SpO2?

4 A. Yes sir.

5 Q. Could you explain to the jury what the SpO2 is?

6 A. It's just a major percent of your blood that's
7 oxygenated. They put a probe on your finger usually, just
8 measures a percent of your hemoglobin that's got oxygen on it.

9 Q. Okay, pain scale?

10 A. Yes.

11 Q. The coma scale?

12 A. Yes.

13 Q. And what is a RTS?

14 A. I'm guessing that's a revised trauma score and I'm not
15 sure why you would do, but I don't know for sure what that is.

16 Q. All right. Anything wrong with those vitals right
17 there?

18 A. No, sir.

19 Q. Okay, is temperature a vital?

20 A. Yes sir.

21 Q. All right, and when -- if a doctor orders the nurse to
22 take vitals, does that include temperature?

23 A. Yes sir. I mean there would be some exceptions to that
24 but in general it would include a temperature.

25 Q. Okay. Based on Kelly Fay's presentation do you know

1 which vital would probably be more important if you weren't
2 going to take but one vital out of the whole spectrum of
3 vitals, which one would be more important with her
4 presentation, based on her presentation, and I'm not talking
5 about triage right now, but throughout the course of her stay
6 based on her presentation, her x-ray reports, and her CT and
7 her urinalysis?

8 A. Well, if I only had -- if I only got one, in a kidney
9 stone patient I'd take a temperature, particularly a young,
10 healthy kidney stone patient.

11 Q. All right, sir. Now, could you tell us what Dr. Law's
12 provisional diagnosis was?

13 A. Yeah. It says renal colic and severe hydronephrosis.

14 Q. Is that hydronephrosis or hydroureter?

15 A. Hydroureter; sorry.

16 Q. All right. I'm going to show you -- do you see on this
17 page, Dr. Sheppard, where the nurse has indicated see next
18 page?

19 A. Yes sir.

20 Q. Can you see that from there?

21 A. Yes sir.

22 Q. I'm going to show you the next page. All right, Dr.
23 Sheppard, if that is in fact a five, as I believe it is, at
24 eight fifty, can we tell what her temperature is?

25 A. No, sir.

1 Q. How about eight fifty-two?

2 A. No, sir.

3 Q. Nine ten?

4 A. No, sir.

5 Q. Nine forty?

6 A. No, sir.

7 Q. Ten twenty, they did take blood pressure, heart rate,
8 and respiration, did they not?

9 A. Yes sir.

10 Q. Do you see a temperature?

11 A. No, sir.

12 Q. Have you read anywhere in the records at all that she
13 ever at -- even at twelve o'clock at discharge that they ever
14 took another temperature before she was sent home?

15 A. No, sir. There was no other temperature that I could
16 find in the chart.

17 Q. All right. Do you have any opinions in regard to the
18 standard of care, whether or not -- and let me ask you this,
19 too, Dr. Sheppard, before we have to do this every time. Are
20 all -- if you render an opinion to this jury in this case,
21 you're explaining an opinion to them, would your opinion be to
22 a reasonable degree of medical certainty that most likely what
23 occurred?

24 A. Yes sir, I think I understood it.

25 Q. More likely than not?

1 A. More likely than not and to a reasonable degree of
2 medical certainty, yes.

3 Q. All right, sir. Do you have any opinions in regard to
4 the nursing standard of care in regard to not taking her
5 temperature after triage?

6 A. Yes sir. I mean, again, that's the most important
7 vital sign in a kidney stone patient because that's the one
8 thing that turns it from a routine kidney stone into something
9 else and it's certainly below the standard of care to have
10 somebody in your emergency department for four hours without a
11 second temperature.

12 Q. Okay. Now why -- why was temperature so important
13 again, why?

14 A. Because if you have a kidney stone, ninety plus percent
15 of the stones are kidney stones that may or may not pass, but
16 they're not life-threatening. They're very painful, but
17 they're not life-threatening. If ---

18 Q. Is that a simple or a complicated kidney stone?

19 A. Well, it can be either. I mean it can be complicated
20 because it's a big stone that's not passing. It can be
21 complicated for other reasons. It doesn't become life-
22 threatening until it's associated with an infection. Once
23 this kidney stone becomes associated with an infection it
24 becomes a life-threatening emergency and that's why
25 temperature is so important and why infection is so important.

1 It changes it from being, you know, a kidney stone that
2 you can sort of live with as long as you can stand the pain
3 although, you know, at some point you'll actually do damage to
4 the kidney but it's going to be a chronic, you get to go home,
5 you get to try to pass the stone, and you get to wait as long
6 as you want to, as opposed to I've got a kidney stone, I've
7 got a fever, then it's a life-threatening emergency that
8 somebody needs to be doing something about. You need to be on
9 antibiotics, you -- the urologist will tell you all the things
10 they can do, and there's a bunch of options that, again,
11 outside my field of expertise.

12 As an emergency physician I just know that it changes it
13 from being a kidney stone that I don't have to worry too much
14 about you to one that I really have to worry that, you know,
15 you could lose a kidney, you could die, and that's why it's so
16 important.

17 Q. Okay, just to be very clear, Dr. Sheppard, do you have
18 an opinion as the whether or not Kelly Fay had an obstructing
19 kidney stone? Was there anything else to the obstruction
20 relevant in regard to extravasation or anything like that that
21 was relevant to her kidney stone that she was at South Strand
22 for that Saturday?

23 A. Well, I mean, it's all relevant and there was reportive
24 extravasation, and extravasation means that the pressure
25 behind that stone is just high enough that it's pushing urine

1 outside the kidney or outside the ureter because the back
2 pressure is so high, and that again is just another indicator
3 that this is a high-grade obstruction and, you know, the
4 urologists again have different things they do for this kind
5 of stuff, but it's just important. It doesn't become as
6 important in my opinion as whether or not she's got an
7 infection. Again, extravasation doesn't change this into a
8 life-threatening emergency whereas infection does.

9 Q. Okay. Where is that urine going that's getting pushed
10 out of her system, out of her collective system?

11 A. Well, I mean, you're not talking about a big quantity
12 and it's just leaking out of the kidney or leaking out of the
13 ureter and around. It's just going into the retroperitoneal
14 space. It's going into the space the kidney is in. The
15 kidney is actually outside the abdominal cavity. It's
16 retroperitoneal, and there's a space back there that that can
17 dissect into, just spread out back around the kidney, and
18 we're not talking -- we're not talking gallons of that.

19 What will eventually happen is that kidney, because of
20 the back pressure, will stop working. It will just stop
21 making urine and the urine will be made by the other kidney,
22 and in this case you have evidence of that because the
23 urinalysis was completely normal which means you're probably
24 getting nothing but urine from the other kidney, can't prove
25 that, but that's the more likely cause.

1 Q. Okay. When you say you can't prove it that means you
2 can't prove it a hundred percent?

3 A. Correct. I mean there's -- there's no way that you
4 could for sure tell where the urine is coming from. It's just
5 more likely than not it's coming from the other kidney.

6 Q. Dr. Sheppard, do you have an opinion as to whether or
7 not Kelly Fay should have been sent home without Dr. Law, and
8 Dr. Young, and the nurses knowing whether or not she had a
9 fever?

10 A. No, sir, she should not have been sent home without
11 knowing that.

12 Q. And is that a deviation from the standard of care in
13 your opinion?

14 A. Yes sir.

15 Q. All right. Now, have you seen the typewritten report
16 that was dictated by Dr. Law?

17 A. Yes sir.

18 Q. First of all let me ask you this; based upon the
19 opinions that you just gave in regard to whether or not
20 certain things should have been done, considering the fact
21 that they weren't done, what should have happened to comply
22 with the standard of care as between Dr. Law and Doctor -- and
23 the nurses? Well, let me -- let me take it back.

24 With regard to Dr. Law, what should have been done since
25 the things that you say should have been done weren't done?

1 If he was not going to do those, then what should he have
2 done, if that makes sense?

3 A. I'm not sure that question makes sense. I mean ---

4 Q. All right. Let me ask you a more sensible -- do you
5 have an opinion as to whether or not she should have been sent
6 home?

7 A. If you didn't know that, no, you shouldn't -- you
8 shouldn't send her home. I mean ---

9 Q. Well, what should he have done?

10 A. Put her in the hospital.

11 Q. Did you know ---

12 A. I hate -- I hate to say you had to put her in the
13 hospital because you didn't do it. Temperature, it would have
14 been easier to do a temperature and CBC and -- and then make
15 the decision based on all that in consultation with your
16 urologist, but I guess if you weren't going to do any of those
17 things you could have her admitted to the hospital so they
18 could do those things.

19 Q. Okay, and if that had happened would you even have to
20 have any opinions in regard to Sunday?

21 A. No, sir.

22 Q. She would have been in the hospital?

23 A. Correct.

24 Q. And what would have happened to her in the hospital?

25 A. I'm assuming somebody in the hospital would have been

1 checking her temperature periodically. They would have been
2 monitoring her vital signs and they would have been checking
3 on her.

4 Q. Dr. Sheppard, do you understand what Dr. Law does not
5 have admitting privileges, that he could not admit her to the
6 emergency room?

7 A. To the hospital?

8 Q. To the hospital.

9 A. Correct.

10 Q. All right. Now, who -- who would have had to admit
11 her? If she was going to be admitted, who would have had to
12 make that decision?

13 A. Somebody with admitting privilege. In this case I'm
14 assuming it would have been Dr. Young.

15 Q. Okay, and do you have any -- do you recall reading his
16 deposition?

17 A. Yes sir.

18 Q. He was the on-call urologist?

19 A. Yes sir.

20 Q. All right. Is that -- being the on-call urologist,
21 does that enter into your opinions in any way?

22 A. I'm not sure I understand that question.

23 Q. Does he have any duties to the E.R. -- to the E.R.
24 doctors and to patients that presented, being the on-call
25 urologist?

1 Q. Okay. Does -- tell me if I read this incorrectly.
2 Because the patient is in severe pain with the lack of blood
3 in the urine. she did have a CT scan performed to rule out the
4 possibility of hydroureter; is that what it says?

5 A. Yes sir.

6 Q. Okay, and according to the radiologist, there is a
7 right UPJ stone with moderate to severe obstruction; do you
8 see that?

9 A. Yes sir.

10 Q. Do you recall reading Dr. Law's deposition, Dr.
11 Sheppard?

12 A. Yes sir.

13 Q. And do you recall him saying that he does not read CTs?

14 A. Yes sir.

15 Q. Okay. Let's move on to the next paragraph. What does
16 CONS stand for as far as an abbreviation in your opinion?

17 A. Consultation, I believe, was what -- I believe that's
18 what Dr. Law said it stood for. It makes sense.

19 Q. Can you read that for us, please sir?

20 A. Yes. Case was discussed with Dr. Richard Young, on-
21 call urologist, who requests to see the patient on Monday
22 since the patient's pain is under control. I did explain to
23 the patient, however, that if her pain becomes out of control
24 or if she has increasing nausea, vomiting, any fever or
25 chills, that she is to return to the emergency department

1 immediately.

2 Q. Now do you know -- do you know whether or not from
3 reading the records and the depositions in this case, Dr.
4 Sheppard, whether or not there's a factual dispute about
5 whether that -- this instruction to return immediately to the
6 E.R. department is an issue in this case?

7 A. Yes sir, this is a dispute about whether that was given
8 to the patient or not.

9 Q. Okay. Is there any way for you to resolve that, that
10 factual dispute, Dr. Sheppard?

11 A. No, sir.

12 Q. All right. If you would move down to provisional
13 diagnosis, what was Dr. Law's provisional diagnosis?

14 A. Renal colic and severe hydroureter.

15 Q. All right, and if you refer back to the handwritten
16 note, first page, what was his provisional diagnosis?

17 A. Renal colic, severe hydroureter.

18 Q. No different?

19 A. No different.

20 Q. Now, I want to take you back to the typewritten page.
21 I'm sorry I'm flipping you back and forth.

22 A. That's all right.

23 Q. In his differential diagnosis did he include
24 ureterolithiasis?

25 A. Correct.

1 Q. And explain to the jury what that is, please, Doctor.

2 A. That's Latin for a kidney stone or ureteral stone.

3 Q. Okay.

4 A. We call these -- and let me just explain that a little.

5 We talk about kidney stones; they're not actually stones in
6 the kidney, they're really in the ureter, but it's easier to
7 say kidney stone than ureteral stone, so ureterolithiasis is
8 just Latin for a stone in the ureter.

9 Q. Dr. Sheppard, doctors aren't known for using words that
10 are easier to pronounce, are they?

11 A. Of course not.

12 Q. Let me ask you this; on his differential diagnosis,
13 what was his very next consideration?

14 A. Pyelonephritis.

15 Q. And pyelonephritis is what?

16 A. Infection in the kidney.

17 Q. Have you read the autopsy report in this case?

18 A. Yes sir.

19 Q. Are you -- are you competent to understand and
20 interpret autopsy reports?

21 A. I'm competent to understand autopsy reports.

22 Q. Okay, and what was your understanding of what she died
23 from?

24 A. Sepsis from pyelonephritis.

25 Q. Exactly what he had second in his differential

1 diagnosis ---

2 A. Correct.

3 Q. --- on Saturday?

4 A. Correct.

5 Q. All right. Now, I believe if you'll continue in that
6 package, Dr. Sheppard, you'll find the actual discharge
7 instructions that Ms. Fay signed. Do you see them?

8 A. Yes sir.

9 Q. All right, sir, and if you look up at the very top of
10 that page, of page one, are you on the same page as this, as
11 this chart?

12 A. Yes sir, I think so. Okay.

13 Q. I tell you what, it might be easier if I use a pointer
14 so I can stay out of the jury's way.

15 All right, if you go through these instructions, now is
16 there any way we know that she had these instructions, Dr.
17 Sheppard?

18 A. She signed them.

19 Q. Okay. Kelly Fay signed these instructions?

20 A. Yes sir.

21 Q. All right, so would these be the instructions they had
22 at home?

23 A. I would assume so, that they took them home.

24 Q. Unless they threw them away?

25 A. Yeah.

1 Q. All right. Now, the first thing that I see up here, do
2 you see the phone -- do you see the phone number for South
3 Strand?

4 A. Yes sir.

5 Q. All right, and then these instructions were for who?

6 A. Fay, Kelly.

7 Q. All right, the next paragraph kidney stones; would you
8 read that?

9 A. You want me to read it?

10 Q. Yes sir.

11 A. Your exam shows you have had a kidney stone. Kidney
12 stones usually form when there are high levels of calcium or
13 uric acid in the urine. They may also result from repeated
14 urinary infections. There is usually a great deal of pain
15 when a stone passes from the kidney down the tube,
16 parentheses, ureter, close parentheses, to the bladder.
17 Kidney stones that block the ureter completely can cause
18 permanent damage to the kidney. Surgery or lithotripsy is
19 necessary sometimes for larger stones.

20 Q. Okay. Do you agree with that?

21 A. Yes sir.

22 Q. All right. Now, if you'd jump down to -- I don't want
23 to make you read it because the jury is going to have this in
24 the jury room and they can read it themselves when they get
25 back there, but if you jump down to the last sentence in that

1 paragraph right here about what she's supposed to do, could
2 you read -- does that say call or go to the emergency room
3 right away if you develop fever, more intense pain, or
4 repeated vomiting?

5 A. Yes sir.

6 Q. Dr. Sheppard, what do you find unusual about that
7 sentence, if anything, and if you do, tell the jury what it
8 is.

9 A. Well, it's unusual for emergency departments to give
10 instructions to call them because we don't like people to call
11 because we don't have a good way to handle those; it's more
12 difficult, so generally our instructions will say go to the
13 emergency department.

14 Q. All right. Now, if, in fact, they decided to leave,
15 call, or go to the emergency room right away if you develop
16 fever, more intense pain, or repeated vomiting, what should
17 they do if the person does call back and say, I've got chills,
18 or fever, or vomiting, or pain, or whatever it is they're
19 calling back for?

20 A. Well, if you're -- if you're going to take the call,
21 then you have to have some mechanism for handling that in an
22 appropriate way. You can either take the call and say tell
23 everybody to come back, which is one option, or you can have a
24 line set up where they can get accurate medical advice about
25 what to do, but that's -- I mean that's the problem with

1 emergency departments, it's difficult to do that in an
2 emergency department.

3 Q. Okay, and do you have an understanding whether or not
4 the same nurses were working on Sunday as were working on
5 Saturday?

6 A. I don't have an accurate understanding of that.

7 Q. All right. Regardless of what nurse was working on
8 Sunday, Dr. Sheppard, did you read Sean Fay's deposition
9 testimony?

10 A. Yes sir.

11 Q. Do you recall the testimony in regard to what was said
12 as to whether he called and if he called what was said to him,
13 what was told to him?

14 A. Yes. According to his deposition, he called the
15 emergency department and they said, and I'm paraphrasing, but
16 essentially said if she feels like she needs to come back in,
17 come back in. If not, continue to take your pain medicine and
18 drink fluids.

19 Q. Do you have any -- do you have any problems with a
20 nurse and/or doctor, female doctor, or whoever answered the
21 phone, giving those kind of -- giving that kind of advice over
22 the phone?

23 A. Yes. I mean, if you're going to give advice, it should
24 be medically accurate and if you're giving advice to a kidney
25 stone patient who calls and says I have a fever, then your

1 advice ought to be to come back in now.

2 Q. Dr. Sheppard, but what if you have nurses that know
3 that a kidney stone and a fever is an emergency and somebody
4 calls and says I was there yesterday with a kidney stone and a
5 -- a kidney stone. Now I've got a temperature and now chills.
6 What response would comply with the standard of care?

7 A. I think there are a couple of options. One is you
8 could say come back in. That would certainly comply with the
9 standard of care. Your other option would be to grab whatever
10 doc is working in the E.R. and say here's the story, pass the
11 buck, if you will, on the nurse's part to the doc and say,
12 what should I tell them to do? Either of those would comply
13 from -- from what the nurse should do as a standard of care.

14 Q. Okay. Do you have an opinion whether or not the
15 discharge instruction, the, quote, discharge instructions,
16 that Dr. Law put in the last paragraph of his typewritten note
17 to come back immediately and these that say call or come back
18 immediately, whether there's any conflict between the two?

19 A. Well, yeah. His -- his note says come back, and the
20 other note says call or come back.

21 Q. So what are you supposed to do?

22 A. I -- I mean, I don't know. We know that people don't
23 remember their discharge instructions very well which is why
24 we provide written discharge. It's hard to remember all that
25 stuff that I tell you when you're in the emergency department

1 and you're sick and you don't feel good, and all that stuff,
2 so that's why we give written discharge instructions.

3 Q. Well, that was my question; why do you even give
4 written discharge instructions?

5 A. Yeah, because it's hard to get home and remember
6 everything that you were told in the emergency department and
7 we know that. That's why, I mean, every emergency department
8 gives written discharge instructions.

9 Q. All right, so at -- at this point we're working off of
10 a differential diagnosis of kidney stone, pyelonephritis, or
11 cholecystitis, is that correct?

12 A. At which point?

13 Q. At the point before the KUB and the CT was performed?

14 A. Correct.

15 Q. Okay, and is cholecystitis and abdominal pain a
16 problem?

17 A. Yes sir.

18 Q. Is pyelonephritis and abdominal pain a problem?

19 A. It can be. I should say kid- -- I mean, gall bladder
20 can also hurt in the flank and the back. I mean that's where
21 this differential that he wrote came from. I suspect there's
22 lots of other things that could be in there, but those are the
23 three most likely for somebody with right-sided flank
24 abdominal pain would be those three.

25 Q. Okay, and how about a kidney stone?

1 A. The emergency department medical director and emergency
2 department nurse manager.

3 Q. And it applies to?

4 A. The emergency department.

5 Q. And it was effective when?

6 A. 1978, April.

7 Q. All right. Now, what does it say, Dr. Sheppard, down
8 here with a patient with a complaint of chest pain or
9 abdominal pain?

10 A. It says will have a minimum of two vital signs
11 recorded, blood pressure in the emer- -- blood pressure will
12 be repeated on patients in E.D. after one hour.

13 Q. Okay, when it says -- Dr. Sheppard, when it says a
14 patient with a complaint, and I'll skip over -- abdominal pain
15 will have a minimum of two vital signs recorded, does that
16 mean exactly what it reads?

17 A. Yes sir.

18 Q. All right, and as an E.R. physician, Dr. Sheppard, is
19 that something that should be followed?

20 A. Yes sir.

21 Q. I mean, are you expected -- are E.R. doctors and E.R.
22 nurses expected to follow policy, E.R. policy and procedure?

23 A. Yes sir.

24 Q. Let me ask you this, too, because I forgot to ask you
25 this. As far as on Saturday, January 26th, 2002, when they

1 sent her home, ultimately whose -- whose order is it that
2 discharges a patient? Does the nurse decide that the patient
3 needs to go home or does the E.R. doctor decide that the
4 patient needs to go home?

5 A. The E.R. doctor decides that.

6 Q. All right, and then who physically discharges the
7 patient?

8 A. That's usually the nurse.

9 Q. I want to ask you another thing about -- Dr. Sheppard,
10 about did you see any medication she got in the emergency
11 department while she was there from eight to twelve?

12 A. Yes sir.

13 Q. And what medications did she get? Do you recall right
14 off the top of your head or ---

15 A. She got Toradol, Phenergan, and Dilaudid.

16 Q. All right. Is that pretty standard? Do you have any
17 criticism of that?

18 A. No, sir. They're standard kidney stone medicine.

19 Q. How strong is Dilaudid?

20 A. It's a narcotic.

21 Q. Do you have a ---

22 A. It's -- it's a fairly potent narcotic. I mean all
23 narcotics work through kind of the same receptor, so stronger,
24 weaker doesn't make a -- it's a question of how much you give.
25 You can give enough Morphine to be more potent than Dilaudid.

1 You can give enough Fentanyl to be more potent than Dilaudid
2 or you can give enough Dilaudid to be more potent than
3 Morphine. Milligram for milligram, it's roughly ten times as
4 potent as Morphine.

5 Q. Ten times as potent as Morphine?

6 A. Yeah, milligram for milligram, but, I mean, you
7 compensate for that by adjusting the dose.

8 MR. FOSTER: Beg your indulgence one moment.

9 Q. Dr. Sheppard, I believe that's all I have for right
10 this -- but let me just end up so there's no confusion. Do
11 you have an opinion as to whether or not Dr. Law as the
12 emergency room physician on Saturday, January 26th, 2002, in
13 conjunction with her treating nurse and discharge nurse, do
14 you have an opinion as to whether or not they deviated from
15 the standard of care?

16 A. Yes sir, I do.

17 Q. And I believe you have -- you're not rendering opinions
18 on proximate cause, is that correct?

19 A. No, sir.

20 MR. FOSTER: All right, I'll turn you over to these
21 other lawyers, Dr. Sheppard, and I appreciate your time.

22 A. Thank you.

23 Q. Oh, I forgot to ask you one thing. Dr. Sheppard, are
24 you charging for your time here today?

25 A. Yes sir.

1 A. I don't remember whether it was the first one or not,
2 but yes. It was certainly one of the items.

3 Q. Well I'm happy to -- let's look at page forty-six of
4 your deposition. Now if you'll see -- Doctor, have you found
5 page forty-six?

6 A. Yes sir.

7 Q. If you'll look at line fifteen, that's where you told
8 me what your opinion was, correct?

9 A. Yes sir.

10 Q. Okay, and then line twenty-two, "And how about telling
11 the facts which you relied upon to support that ultimate
12 opinion", and your response was, there was no CBC, is that
13 right?

14 A. Yes sir.

15 Q. All right, sir, let's look on page twenty-six --
16 correction -- let's look on page sixty-six. D you have it?

17 A. Yes sir.

18 Q. All right, on line thirteen, that's me. I said, "All
19 right, so (A) on deviations, in your opinion, would be not
20 ordering a CBC. What is (B) if at all?" And then you said
21 then, "By not checking another temperature"; is that right?

22 A. Yes.

23 Q. And let's talk about temperature a minute. You've
24 agreed that on -- when Kelly Fay got to the hospital at eight
25 o'clock -- they triage immediately, didn't they?

1 A. Yes sir.

2 Q. Took her back to the room in no time, minutes.

3 A. Yes sir.

4 Q. They took her temp then?

5 A. Yes sir.

6 Q. And it was 98.1?

7 A. Yes sir.

8 Q. Perfectly normal?

9 A. Yes sir.

10 Q. Now on the temp discussion in 2006, your point was,
11 well we need at least two, doesn't have to be admission and
12 discharge but we just need two to meet the standard of care;
13 is that right?

14 A. Yes sir.

15 Q. So the question was asked, if a temp had been taken at
16 10:20, when she gets back from CT, you can't say, with a
17 reasonable of any certainty, medical certainty, that it would
18 have demonstrated a fever which, in your definition, is 100.5;
19 is that right?

20 A. Yes sir.

21 Q. Now your testimony on infection is based on fever; is
22 that right, alleged fever, in the E.R.?

23 A. I guess I don't understand that question.

24 Q. Was there any clinical sign of a fever in the E.R.?

25 A. Not that's in the record, no sir.

1 Q. Okay. There are certain things that medical people can
2 observe to kind of tell, perhaps, if there's a fever. You
3 might be sweaty, you might be cold to the touch, your heart
4 rate may shoot up; is that right?

5 A. Yes sir, those all may be signs of a fever.

6 Q. Okay. But you told you were basing fever on Mr. Fay's
7 testimony, that within thirty minutes of leaving the hospital
8 it was 101.3, or something to that affect. That's what you
9 told us.

10 A. Yes sir. I believe the question was, if that were true
11 would she have, more likely than not, had a fever at
12 discharge, and I believe my answer was yes.

13 Q. That's exactly right. But the thirty minutes is the
14 key to your testimony, right? You said within thirty minutes,
15 if she had a fever.

16 A. Correct. If she had a fever thirty minutes after
17 leaving she, more likely than not, would have had one when she
18 left.

19 Q. Now you agree, Dr. Sheppard, that Kelly Fay was
20 discharged at noon, twelve o'clock.

21 A. Yes sir.

22 Q. And you do understand, since you've read Mr. Fay's
23 deposition, that upon discharge he said -- he testified at
24 this trial that he got home about one o'clock.

25 A. Yes sir.

1 Q. Okay. And on the way home, even though it's a short
2 distance from South Strand to his house, he stopped by Wal-
3 Mart to take the prescription in to Wal-Mart to get filled for
4 the pain medicine; you understand that?

5 A. Yes sir.

6 Q. Then he takes Kelly home; you understand that?

7 A. Yes sir.

8 Q. Then he goes back to Wal-Mart to get the -- pick up the
9 prescription if it's ready, right?

10 A. Yes sir.

11 Q. Then he comes back home and he takes Kelly's fever,
12 temperature.

13 A. Yes.

14 Q. Now, Doctor, if Kelly did not have 103.5 within an
15 hour, you cannot say, to a reasonable degree of medical
16 certainty, that in your opinion she would have had a fever at
17 the emergency department; isn't that true?

18 A. If -- if she did not have a hundred and three and a
19 half fever ---

20 Q. All right, now let's strike it. If she didn't have a
21 hundred point five, in your opinion, within an hour -- if she
22 had it after an hour you can't say, to a reasonable degree of
23 certainty, she had had a hundred point five in the E.D., can
24 you?

25 A. No sir, I cannot.

1 representing, failed to take a temperature which, in your
2 opinion, caused the problem, but to be clear, you didn't even
3 know who she was by name.

4 A. No sir.

5 Q. And, Doctor, let's talk a little bit about your
6 experience testifying against nurses. I think you told this
7 jury that this is the first time that you are representing to
8 a court that you know the standard of care for a nurse,
9 correct?

10 A. Correct.

11 Q. And let's talk about that a bit. Do you recall being
12 asked, in a number of other cases, whether you knew the
13 standard of care applicable to a nurse?

14 A. Yes sir.

15 Q. And do you recall testifying in 1998 -- and I can show
16 you your testimony if you'd like -- that you would not pretend
17 to know the standard of care for a nurse?

18 A. Correct.

19 Q. So are you pretending today that you know the standard
20 of care?

21 A. No sir, I'm -- was asked the question if she should
22 have had a discharge temperature and if I think she should
23 have who is responsible for taking it, that would be nurse.
24 But, no, I am not an expert on nursing standard of care.

25 Q. Let me clear, you testified that you did not pretend to

1 know the standard of care for nurses; is that correct?

2 A. That's correct.

3 Q. My question is, are you here today, after I've heard
4 earlier, pretending to know the standard of care applicable?

5 A. No sir, only in that one specific item, which is that
6 temperature should have been taken.

7 Q. So that's the only criticism, and so, do you anticipate
8 testifying against nurses in the future?

9 A. It depends on the question I'm asked in the future.

10 Q. So, if someone asks you in a deposition if you pretend
11 to know the standard, what are you going to say then?

12 A. I'll say the same thing I've said in depositions. I
13 know how I interact with nurses. I don't know what the
14 nursing standards of care.

15 Q. So if someone else comes in this courtroom and says
16 nurses did something else wrong, other than taking a
17 temperature, you disagree with that?

18 A. I don't know how to answer that question.

19 Q. Well, you don't have any other criticisms, correct?

20 A. Of the nurses in this case, no.

21 Q. Sure. So if someone else came to this courtroom and
22 said they had other criticisms of the nurses, you would
23 disagree?

24 A. I don't know whether I would disagree or say I don't
25 know.

1 Q. And nurses in fact, to your knowledge, have done that
2 as well.

3 A. Yes.

4 Q. So then, in terms of assessing a patient's temperature,
5 if you will, are there physiologic ways of determining whether
6 you need to check the temperature, or whether that patient is
7 afebrile, would include several different approaches; is that
8 correct?

9 A. I -- I think those are clearly approaches that might
10 say, yeah, I need to check another temperature, I'm listening
11 to them and all of a sudden they feel really hot, I'm not sure
12 those are at all reliable in the opposite, which is saying,
13 patient is afebrile.

14 Q. Okay, let's address that directly then. You would
15 agree that a physiologic response -- I want to make sure I'm
16 correct on this -- to an increased temperature, would be an
17 elevation in a patient's heart rate.

18 A. Correct.

19 Q. And let's make sure the jury understands so in -- I
20 think you testified -- more than fifty percent of the time.

21 A. Yes sir.

22 Q. So physiologic response to an increased temperature is
23 increased heart rate.

24 A. Correct.

25 Q. Can I write that down?

1 A. Yes sir.

2 Q. And in this case, in the three sets of vitals that were
3 taken, there was no increased heart rate, correct?

4 A. Correct. But you are -- the problem is, and the reason
5 it's not reliable, is you are doing other things, because pain
6 will increase your heart rate, so if you treat the pain you
7 would expect the heart rate to fall. If -- if theoretically,
8 I was in eight out of ten pain, and you treated my pain, my
9 heart rate is going to drop. If at the same time you're
10 treating my pain and my heart rate is dropping from that, I
11 get a fever, my heart rate goes back up and I can end up at
12 essentially the same place. That's why -- I mean, that's why
13 we have thermometers, is not -- because you -- any number of
14 things affect the heart rate, pain, stress, worry, you know,
15 your heart rate may go down because you say, okay, it's only a
16 kidney stone, it's not cancer, or it's not something else. I
17 mean any number of things affect that. That's why it's not,
18 in and of itself, a very reliable indicator.

19 Q. Let me direct that: Before I leave this topic let me
20 make sure the jury clearly understands how many sets of vitals
21 were taken. You will acknowledge that vital signs were taken
22 at -- actually at the time of arrival.

23 A. Yes sir.

24 Q. The second set was taken at 9:10?

25 A. Yes sir.

1 Q. And, in fact, you know it did?

2 A. Yes sir.

3 Q. And if the bacterial count is going up those bacteria,
4 from time to time, have -- I don't want to say by-products,
5 but it leads to an increase in the temperature?

6 A. Yes sir.

7 Q. So, -- which we won't to get into -- so in this case
8 you would have expected the temperature to continue to rise.

9 A. Right. I'm ---

10 Q. In this case?

11 A. In this case I would expect the temperature, over time,
12 to continue to rise. That didn't -- don't translate that
13 into, I think it's going to go up in a linear progression. It
14 may spike, drop off, spike, drop off because you may dump the
15 cytosines out, the body may take care of them, and your
16 temperature will drop, you'll grow more bacteria, the cycle
17 will repeat itself, so it's not -- it's not like I would -- I
18 would not expect the temperature to be on a constant linear
19 progression over time.

20 Q. You clearly wouldn't expect the temperature to be the
21 same consistently over a forty-eight to fifty hour period of
22 time based on what you just said.

23 A. No. You wouldn't -- you would not expect it to be the
24 more common more likely than not. You would have up and down
25 variations in the fever. You would not expect it to be a

1 constant temperature, doesn't mean it couldn't happen, but you
2 wouldn't expect that.

3 Q. But physiologically, as a clinical scientist, you would
4 not expect that.

5 A. No sir.

6 Q. You would not tell another physician that, you would
7 not tell a patient that.

8 A. No.

9 Q. Just to be clear. So, in this instance, based on what
10 you know about the records, you would have expected Kelly Fay
11 to be sicker Sunday morning than she was when she left E.D. on
12 Saturday.

13 A. Yes sir.

14 Q. You would have expected Kelly Fay to be sicker Sunday
15 night than she was on Saturday morning?

16 A. Right.

17 Q. And sicker Sunday night than Sunday morning?

18 A. Right. In, in general, That doesn't mean, again hour
19 to hour. You couldn't feel better ---

20 Q. I understand.

21 A. Okay.

22 Q. Doctor, based on what you know about this case, based
23 on what you know about pathophysiology, you would have
24 expected Kelly Fay be substantially sicker Sunday night than
25 Sunday morning?

1 A. Yes sir. I would expect -- I would expect her to be
2 getting progressively sicker, on a global sort of thing. It
3 doesn't mean that at 5:00 she wouldn't feel better than she
4 did at four, and then worse at six than she felt at four. if
5 that makes ---

6 Q. But we are talking twelve hour period of time now.

7 A. Correct. So when you say Sunday morning, Sunday night,
8 if you're talking about, you know, say three or four hours
9 Sunday morning, and three or four hours Sunday night, you
10 expect her to be worse Sunday night.

11 Q. Based on what you know about this record. And, Doctor,
12 Monday morning, based on what you know about this record, you
13 would expect Kelly Fay to be, to a reasonable degree of
14 medical certainty, substantially sicker than she was Sunday
15 night.

16 A. Yes sir.

17 Q. Substantially sicker than she was Sunday morning?

18 A. Yes sir.

19 Q. And substantially sicker than she was Saturday when she
20 went to the emergency room.

21 A. Yes sir.

22 MR. LEE: No further questions. Thank you.

23 THE COURT: All right, no cross-examination for Dr.
24 Young?

25 MS. SCALISE: Right, Your Honor.

1 minute ago; is that correct?

2 A. Yes sir. I said, no, I do not know the standard of
3 care for nurses.

4 Q. All right, but when I was qualifying you as a witness -
5 - and I'll ask you again, Dr. Sheppard, do you know the
6 standard of care of nurses working in the emergency room and
7 what they should do?

8 A. As -- as far as those interactions, where they interact
9 with me. I wouldn't -- I mean there are obviously nursing
10 standards that they do, that work in the emergency department
11 that I don't -- I'm not an expert on, but the things that they
12 should do for me, yeah, I know what they're supposed to do,
13 and I think that's sort of in my stand in every deposition.

14 Q. Are the vital signs included in one of the things that
15 they should do for you?

16 A. Yes sir.

17 Q. And as long as we're on that subject, I believe Mr. Lee
18 asked you, weren't there three sets of vital signs taken. Do
19 you recall that question?

20 A. Yes sir.

21 Q. And you said there were three sets of vital signs
22 taken; is that correct?

23 A. Yes sir.

24 Q. All right, is temperature a vital sign?

25 A. Yes sir.

1 Q. Were there three temperatures taken?

2 A. No sir.

3 Q. Were there three full sets of vitals taken?

4 A. No sir.

5 Q. All right. In the policy and procedure that I showed
6 you a little while ago, for patients with abdominal pain, is
7 there any exception that you've seen in that policy and
8 procedure that says that you don't have to take a temperature
9 when it says you have to take a minimum of two vital signs for
10 abdominal pain patients? Are there any exceptions to that?

11 A. No sir.

12 Q. Do you have an opinion as to whether, when they took
13 the rest of these vitals, some -- when they took the rest of
14 Ms. Fay's, Kelly Fay's vital signs. that they should have --
15 do you have an opinion. one way or not, whether they should
16 have just stuck a temperature on her mouth and finished out
17 and taken her temperature?

18 A. Yes sir.

19 Q. And your opinion is what?

20 A. They should have.

21 Q. Now do you have an opinion, Dr. Sheppard, whether based
22 on the fact that the nurses did not take the temperature that
23 that proves she didn't have a fever?

24 A. No, sir. I mean I'm not sure I answered that question
25 right. I don't think that proves she didn't have a fever.

1 Q. Okay, let me ask you this. You were asked a lot of
2 questions about other ways to take a fever (SIC). Is there
3 any better way -- I mean a temperature -- is there any better
4 way to take a temperature than to put a thermometer in
5 somebody's mouth?

6 MR. AIKEN: Object to the leading.

7 THE COURT: I'm going to sustain that, Counsel. You
8 can't lead your witness.

9 Q. What is the best way, Dr. Sheppard -- what is the best
10 and most accurate way of determining whether someone has a
11 fever?

12 A. To take a rectal temperature is the best and most
13 accurate way.

14 Q. And before that?

15 A. Oral temperature.

16 Q. Okay. Now, let me ask you this. If a person, in
17 general, has a fever, Dr. Sheppard, do you have an opinion as
18 to whether or not they are necessarily hot, always hot?

19 A. You mean subjective hot, or feel hot when I touch them?

20 Q. Feel hot when you touch them.

21 A. No. They are not always.

22 Q. Okay. Do you recall all those questions by Mr. Lee
23 about -- about other ways to tell temperature, or a fever, or
24 that kind of thing?

25 A. Yes sir.

1 Q. Okay, are patients -- do you know whether or not -- do
2 you have an opinion whether or not patients with fevers are
3 always -- let me just start from the beginning -- always hot?

4 A. No sir, they're not.

5 Q. Okay, are they -- do you have an opinion as to whether
6 or not sometimes patients with a fever are cold?

7 A. Yes sir, sometimes they are.

8 Q. Do you have an opinion as to whether or not patients
9 with fever -- their heart rate always goes up?

10 A. No, sir. Nothing -- nothing is always, and again, up
11 from where is sort of the question.

12 Q. Okay, I believe you said over -- maybe over fifty
13 percent of the time.

14 A. Yes sir.

15 Q. Did I misunderstand you?

16 A. No, sir. I think any time you have a significant fever
17 -- and the higher the fever the more likely that is true.
18 Obviously if you're at a hundred and one you are not as likely
19 to have a fast heart rate as if you're a hundred and four.

20 Q. Okay.

21 A. I think a hundred and four, probably ninety percent of
22 people will have an elevated heart rate. At a hundred and
23 one, probably closer to fifty percent, if that.

24 And again, elevated from your baseline, not necessarily
25 over what we would consider an elevated ---

1 phrase it. I'm going to sustain the objection.

2 MR. FOSTER: I'll try it one more time.

3 THE COURT: I'll give you one more opportunity to
4 rephrase, and then we're going to move forward.

5 Q. Dr. Sheppard ---

6 THE COURT: Counsel -- and I would tell you that the
7 term to roll the dice is an argumentative term which, in part,
8 brings the objection. Please move forward.

9 Q. Dr. Sheppard, do you have an opinion as to whether or
10 not a reasonable degree -- and I asked you, I think, at the
11 beginning, are your opinions to a reasonable degree of medical
12 certainty, more likely than not. Do you have an opinion
13 whether it's within the standard of care, or deviation from
14 the standard of care, to not take a temperature to determine
15 fever in a kidney stone patient?

16 A. Yes sir. And I mean, clearly, relying on ancillary
17 signs that are not nearly as reliable, as opposed to putting a
18 temperature in somebody's mouth is -- if you want to know if
19 they have a fever, is a deviation from the standard of care.
20 You wouldn't do that. For any patient, you want to know if
21 they had a fever you'd take their temperature. You wouldn't
22 say, well let's check their pulse, respiratory rate, all those
23 things. They're not as accurate, and not like taking a
24 temperature is a difficult task that has some risks to it, so
25 no, it would -- it would be a deviation -- if you wanted to

1 know if a patient had a fever it would be a deviation of the
2 standard of care to not take a temperature.

3 Q. Let me ask you another question that Mr. Lee asked you
4 about, I believe, Dr. Sheppard, about the half life of Toradol
5 and the half life of Dilaudid. Do things change when you --
6 do things -- do you have an opinion as to whether or not
7 things change when you add one on top of the other?

8 A. I don't have an opinion on that. I don't ---

9 Q. Okay.

10 A. There's no evidence, that I know of, on that. That
11 would be a good pharmacology question.

12 Q. And the other thing I wanted to ask you, Dr. Sheppard,
13 did you -- did you -- do you recall seeing the prescription
14 records?

15 A. Yes sir.

16 Q. Do you recall whether or not the prescription records
17 with Wal-Mart, the way they were prescribed from the E.R.
18 physician -- well let me ask that, who was the prescription
19 issued by in the emergency room?

20 A. Dr. Law.

21 Q. Dr. Law?

22 A. Yes sir.

23 Q. All right. I'm going to show you what's been marked as
24 Exhibit 4, and I'm going to ask you to read the directions
25 that would have been on the label of the bottle from Wal-Mart

1 as to when, or if, Kelly Fay should have taken that
2 medication.

3 A. The directions were, take one or two capsules by mouth
4 every six hours as needed.

5 Q. For?

6 A. That's the directions.

7 Q. All right, is that a prescription for pain, or is it
8 for temperature?

9 A. For pain.

10 Q. Okay, so you ---

11 A. That's a standard pain medication. It does have
12 acetaminophen in it, so it is going to depress your
13 temperature if you -- I mean, depress your fever.

14 Q. That leads me to my next question, Dr. Sheppard. Do
15 you have an opinion, to reasonable degree of medical
16 certainty, more likely than not, whether or not her fever was
17 being reduced by an antipyretic like Tylenol, for example,
18 would that have any affect on whether she had, or still had,
19 or would continue to have an infection?

20 A. No sir. I mean, suppressing your fever doesn't do
21 anything to treat the infection.

22 Q. Okay, fever is just a what?

23 A. Symptom or a sign.

24 Q. Of?

25 A. Of inflammation, most commonly caused by infection. I

1 fifteen minutes.

2 (THE FOLLOWING TAKES PLACE AFTER A BREAK, AND OUTSIDE
3 THE PRESENCE OF THE JURY.)

4 THE COURT: Counsel, do you think you can get your
5 direct done in order for us to go to lunch around 12:30?

6 MR. FOSTER: Yes sir.

7 THE COURT: All right. Very, good.

8 MR. FOSTER: I certainly would think so.

9 THE COURT: Very good.

10 Please bring in the jury.

11 (THE FOLLOWING TAKES PLACE WITHIN THE PRESENCE OF THE
12 JURY.)

13 THE COURT: All right, please call your next witness,
14 Plaintiff.

15 MR. FOSTER: Thank you, Your Honor. We call Ms.
16 Christina Knight.

17 THE COURT: Please come forward and take the oath of a
18 witness.

19 CHRISTINA LAMBERT KNIGHT, being
20 first duly sworn, testifies as follows:

21 DIRECT-EXAMINATION BY MR. FOSTER:

22 Q. Ms, Knight, good morning. Yes, it's still morning.

23 A. Good morning.

24 Q. How are you doing?

25 A. Good.

1 Q. Would you do me a favor and introduce yourself to the
2 jury, please, just a little bit, as far as your background,
3 where you were born and raised, your educational background,
4 and your work experience.

5 A. Christina Knight, born and raised in Daytona Beach,
6 Florida, went to the Community College and got my registered
7 nurse degree -- that was back in 1990 -- primarily worked in
8 the emergency department, floated occasionally throughout the
9 hospital, ICU, CCU, critical areas -- but left clinical
10 nursing back in -- I'm trying to remember -- clinical nursing
11 I define as. at bedside, and that was about 2006, late 2006,
12 and I went to work full time in a law firm, and I worked as a
13 legal nurse consultant, and American Nurses Association
14 considers legal nurse consulting a specialty of nursing, which
15 is clinically -- I'm sorry.

16 Q. Move closer.

17 A. Okay. Sorry. Excuse me.

18 Q. Thank you.

19 A. So I'm still practicing nursing. I still have my
20 registered nurse license, but I just practice a different
21 setting for my nursing.

22 Q. All right, and you're -- how many years -- you were --
23 you were -- you grad -- you got your R.N. when?

24 A. 1990.

25 Q. 1990, so that's -- how long were you in clinical

1 nursing, bedside nursing?

2 A. Seventeen -- sixteen, seventeen years.

3 Q. Did you ever work in the emergency room?

4 A. The majority of the time, yes.

5 Q. Okay. Let me ask you this. When we first contacted
6 you, Ms. Knight, were you still doing clinical nursing?

7 A. Yes.

8 Q. And when we retained you as an expert were you doing
9 clinical nursing?

10 A. Yes.

11 Q. All right, do you feel as though your subsequent career
12 changed to work for a law firm? Does that affect your
13 opinions in any way, or your ability to testify as to the
14 standard of care of a nurse in 2002?

15 A. No sir.

16 MR. FOSTER: Your Honor, we would offer Ms. Knight as a
17 -- as an expert in the area of nursing and emergency room
18 nursing.

19 THE COURT: All right, are there questions for
20 expertise?

21 MR. TODD: Not at this time, Your Honor.

22 MR. AIKEN: Not at this time, Your Honor.

23 MS. MAGEE: Your Honor, we don't have any questions.
24 We understand she's not going to be giving opinions regarding
25 Dr. Young.

1 **THE COURT:** Very good. Then without question, are
2 there objections from any side as to the qualification?

3 **MR. TODD:** She's entitled to give an opinion.

4 **THE COURT:** All right. Hearing none, then you may
5 proceed. So ordered.

6 **MR. FOSTER:** Thank you, Your Honor.

7 Q. Ms. Knight, do you -- after we -- do you recall when we
8 first -- when we first contacted you and asked you if you
9 would review some records for us and tell us what your opinion
10 was in that matter -- in this matter?

11 A. I don't recall the exact day, but it would have been
12 early 2006.

13 Q. Okay, and do you recall receiving a package of
14 information?

15 A. Yes.

16 Q. All right, and what did that consist of, if you
17 remember?

18 A. I don't recall exact what was provided to me.

19 Q. Okay, did you receive the medical records?

20 A. Yes.

21 Q. All right, did you receive depositions?

22 A. I received the ones that were taken up to that time,
23 yes.

24 Q. Okay, and did you -- do you know whether or not you
25 received supplemental information as the case progressed, and

1 time went on?

2 A. Yes, throughout the years, yes.

3 Q. Did any of the later, and supplemental information,
4 change your opinion that you had initially formed in any way?

5 A. No sir.

6 Q. All right, let me ask you this before I -- I got a
7 little bit ahead of myself. After -- what did you consider --
8 and not everything -- but what did you consider most important
9 in forming your opinions in this case?

10 A. The medical records, the facility's policies and
11 procedures, were probably the two most important.

12 Q. All right, did the depositions of the nurses -- did
13 they support your opinion or detract from your opinion?

14 A. They tended to support.

15 Q. All right. And now that I've been talking about
16 opinions let me go back and ask you did -- for the record, did
17 you form any opinions after reviewing these materials?

18 A. Yes, I did.

19 Q. Okay, and do you have an opinion, to a reasonable
20 degree of medical certainty, more likely than not, whether or
21 not the nurses in the E.R., on January 26th, 2002, deviated
22 from the standard of care in the treatment of Kelly Fay?

23 A. Yes, they did.

24 Q. And what are those opinions, if you would just -- and
25 then we'll explore them.

1 A. Two main points are the fact that the full sets of
2 vital signs were not obtained, and the discharges instructions
3 were not clearly described to her, and her husband.

4 Q. All right, let's explore that a little bit. What would
5 you like to read first? Would a good place to start be at the
6 beginning of triage?

7 A. Yes, that's good.

8 Q. All right, I'm going to put this up, and then I'm going
9 to hand you the exhibit?

10 A. Okay.

11 Q. Exhibit 1. I'd like for you to refer to exhibit 1.

12 A. Yes.

13 Q. Do you recognize those records?

14 A. Yes, these are Kelly Fay's records.

15 Q. And dated?

16 A. They are dated January 26, 2001, but I think that's a
17 typo.

18 Q. All right, would you go over the triage sheets and
19 explain to the jury what, if anything, you take issue with?
20 Let me rephrase that question. What, if anything, you think
21 are evidence of, or show deviations from the standard of care
22 on the part of the nurses?

23 A. We can see at 9:10 vitals -- a partial set of vital
24 signs were taken, not a full set, and again at 10:20, on the
25 second page.

1 Q. Okay, and that would be here?

2 A. That would be correct.

3 Q. All right, and what criticism do you have of that?

4 A. Those are not considered a full set of vital signs. A
5 full set of vital signs is a temperature, pulse, blood
6 pressure, respirations.

7 Q. Okay. After having reviewed all the records do you
8 have an opinion, one way or the other, as to what was the most
9 important vital sign with this presentation, with her
10 presentation of a kidney stone, etcetera?

11 A. All are important, but the most important, when you
12 consider that a fever and a kidney stone together is an
13 emergent situation, the temperature.

14 Q. Okay. Do you see where it was ever done after triage
15 at eight o'clock in the morning?

16 A. After the initial one, no.

17 Q. All right. Have you read the depositions of -- did you
18 read the deposition of Nurse New?

19 A. Yes, I did.

20 Q. All right, within in her deposition were you able to
21 make a determination whether or not she was the nurse that was
22 in charge of treating Kelly Fay that day?

23 A. Yes. She was the primary nurse.

24 Q. All right, and do you recall who the discharge nurse
25 was?

1 A. Ms. Doolittle.

2 Q. Was that Mary Beth Doolittle?

3 A. Mary Beth Doolittle, yes.

4 Q. Okay. And would you tell us exactly what you found
5 significant and pertinent, if anything, in Ms. New's
6 deposition, in addition to the triage records?

7 A. In Ms. New's deposition she admitted that, you know,
8 Grand Strand did have a policy and procedure for vital signs,
9 clearly says that you should have at least two full sets of
10 vital signs, and she defined full set of vital signs as
11 temperature, pulse, blood pressure, and respirations, and that
12 she felt that it was a deviation in the standard of care not
13 to do that, and she didn't have an answer why she didn't do it
14 when -- with her set of vital signs, she just didn't do it.

15 Q. How about -- how about Mary Beth Doolittle?

16 A. Ms. Doolittle agreed a full set of vital signs included
17 temperature, pulse, blood pressure, and respirations, the same
18 -- same things I'm saying, and that she didn't think that she
19 needed to another set of vital signs at discharge, and didn't
20 have a reason why.

21 Q. Ms. Knight, can you look at me and tell me what my
22 temperature is right now?

23 A. No sir.

24 Q. Can you feel my wrist and tell me what my temperature
25 is right now?

1 A. No sir.

2 Q. Can you touch my arm and tell me what my temperature is
3 right now?

4 A. No sir.

5 Q. All right, to state the obvious what is a -- what is
6 the most accurate way to determine whether someone, or not,
7 has a fever?

8 A. You obtain a temperature with a thermometer.

9 Q. Let me ask you this, Ms. Knight, do you recall -- and I
10 think there will be at a back an Exhibit of Number 1 -- do you
11 recall the discharge instructions in this case?

12 A. Yes, I do.

13 Q. If you'll bear with me just a second.

14 Well, I think they've been moved some way. I just can't
15 find them. Here it is.

16 All right, now I'll refer to that since it's easier to
17 see, but we'll put this up for the jury to see. Tell us if
18 you have an opinion as to whether or not these discharge
19 instructions constitute a deviation from the standard of care
20 on the part of the hospital.

21 A. The fact that we give them a physical copy of the
22 discharge instructions, no.

23 Q. Okay, what about what they say? How about the content?

24 A. Well we all recognize that we remember just about half
25 of what we hear, so assume that Dr. Law went in and said his

1 discharge instructions, part of the nurse's job is to go back
2 nd, once again, reiterate to you what the importance of the
3 discharge instructions are, and of course, we give you a
4 handwritten copy because then you always go home and you read
5 them again to try to understand, and you apply what you
6 recall, plus what you read, assuming that it's in black -- and
7 white and obviously this is. It says, please call us if you
8 have any question about any medical problems. We are here to
9 serve you. That's one of the first two, three lines up at the
10 top. That would be one of the first things I would do, would
11 be to call.

12 Q. All right, how about down here specifically under
13 kidney stones. Do you see where it says call or go -- call or
14 go to the emergency room right away if you develop fever, more
15 intense pain, or repeated vomiting?

16 A. Right. And the way these are set out that's very much
17 lost in the paragraph. That's down to the bottom of the
18 third, fourth paragraph, depending on how you count it. It
19 doesn't seem that it implies that it's of a major importance,
20 and that's where, again, the nurse has to come in and say,
21 this is very important to understand, that if you have any of
22 those symptoms that are described here you have to come back,
23 or call, according to these instructions. You kind of have to
24 not read it verbatim the them, but you need to bring out the
25 very important points.

1 Q. And do you have an opinion, Ms. Knight -- and again all
2 -- are all your opinions that you render today going to be to
3 a reasonable degree to nursing certainty, more likely than
4 not, true?

5 A. Yes.

6 Q. Okay, do you have an opinion about, if the discharge
7 instructions are going to say call or go back to the emergency
8 room if you develop pain or nausea or fever or any of the
9 things that are listed there, what should the nursing and/or
10 E.R. physician, staff, do if the patient calls back with these
11 symptoms?

12 A. They should address the problem, especially since they
13 were seen the day before.

14 Q. All right, let me ask you this, Ms. Knight. Did you
15 list any associations that you're a member of, when you talk
16 about your work experience?

17 A. I did not.

18 Q. Would you?

19 A. I'm associated with the Emergency Nurses Association.
20 which I'm certified through them as a certified emergency
21 nurse.

22 Q. All right, is there a difference between being a
23 certified emergency room nurse and just being a member of the
24 Emergency Nurses Association, and not paying any dues?

25 A. Well, you can be a member of ENA. It's -- the acronym

1 is ENA -- but you have to sit for a special test every four
2 years to recertify, or initially certify. It's called the
3 Board of Emergency Nursing.

4 Q. Okay, now, I believe you testified about Ms. New's
5 deposition, and Ms. Doolittle's, deposition about how they
6 just -- something to the effect they didn't see the need to
7 take her temperature, correct?

8 MR. TODD: Objection, leading.

9 THE COURT: Sustained, Counsel, that's leading. and
10 testimonial.

11 MR. FOSTER: Withdrawn, Your Honor.

12 Q. I'm going to ask you this. As far as them taking vital
13 signs, or -- I mean blood pressure, heart rate, respiration
14 rate on three occasions, in your opinion, which is the most
15 important vital sign to be taken in Kelly Fay's presentation?

16 A. Again -- we just talked about that, but under the
17 circumstance, with a kidney stone and potential fever, it's
18 temperature.

19 Q. Okay, in your opinion did she evidence any -- in your
20 nursing opinion do you -- do you have an opinion whether or
21 not she evidenced any symptoms or signs of having any problems
22 with her blood pressure, or her heart rate, or respiration
23 rate, or oxygen saturation level, or anything like that?

24 A. Not up to the time of about 10:20. Beyond 10:20 to the
25 time she was discharged I couldn't tell you.

- 1 Q. Do we know what her temperature was at 10:20?
- 2 A. No sir.
- 3 Q. Any time up until the time she was sent home?
- 4 A. No sir.
- 5 Q. Do we know what -- when she was sent home do we even
- 6 know what her blood pressures was?
- 7 A. No sir.
- 8 Q. Or heart rate?
- 9 A. No sir.
- 10 Q. Or respiration rate?
- 11 A. No sir.
- 12 Q. Or oxygen level?
- 13 A. No, sir.
- 14 Q. Is pain considered a vital sign?
- 15 A. Yes, it is.
- 16 Q. Do we know what her pain was when she was sent home?
- 17 A. No sir.
- 18 Q. Back to these discharge instructions again. Do you
- 19 recall -- flip to the first of exhibit 1. Do you recall Dr.
- 20 Law's typewritten emergency room report?
- 21 A. Yes.
- 22 Q. All right, do you see on the second page where it says
- 23 consult?
- 24 A. I see CONS, so I assume that's consult, consult, yes.
- 25 Q. All right, would you read that, please?

1 A. "Case was discussed with Dr. Richard Young, on-call
2 urologist, who requested to see the patient on Monday since
3 the patient's pain is under control. I did explain to the
4 patient, however, that if her pain becomes out of control, or
5 if she has increases nausea, vomiting, or any fevers and
6 chills, that she is to return to the emergency department
7 immediately."

8 Q. All right, in reading the depositions in this case, and
9 the medical records, Ms. Knight, did you come to any
10 conclusions as to whether there's a factual dispute about
11 whether or not this was even said?

12 MR. TODD: Objection.

13 THE COURT: On what basis?

14 MR. TODD: Leading.

15 I'll withdraw it. Let her answer.

16 THE COURT: Withdrawn. Please proceed.

17 A. I'm sorry.

18 Q. In reading the medical records and the depositions in
19 this case. did you -- did you come to any conclusions as to
20 whether or not there was a factual dispute between the parties
21 as to whether these instructions were even given?

22 A. Yes, it's unclear.

23 Q. All right, is there way for to resolve that that you
24 know of?

25 A. No, sir.

1 Q. Let me ask you this question. When you consider --
2 let's assume, for the purposes of my question, that Dr. Law
3 told Sean and/or -- it says told the patient, I believe --
4 that Sean told -- Dr. Law told Sean or Kelly what's typed here
5 -- let's assume that for the purposes of my question -- do you
6 find -- do you have an opinion as to whether or not those
7 instructions are in conflict with the written discharge
8 instructions which they signed and took home with them?

9 A. Yes.

10 Q. Okay, does that -- do you have any opinion or
11 criticisms about that?

12 A. They're not consistent, and again, just like I said
13 before when some -- you hear half of what you say, and you go
14 home and you read this stuff again and it's not what you
15 recall, but when you have it in black and white, and then you
16 base your deci -- excuse me -- your decision on what is
17 written and in front of you, so reasonably from him to call.

18 Q. Okay, did you form any opinions, Ms. Knight, about what
19 Nurse New, in taking care of Kelly Fay, should have done to
20 comply with the standard of care?

21 A. Ask that one more time. I'm sorry?

22 Q. Did you form any opinions in regard to Nurse New, the
23 treating nurse, that was taking care of little Kelly --

24 A. Yes.

25 Q. ---Did you form any opinions about what she should have

1 done during this four visit to comply -- in order to comply
2 with the standard of care?

3 A. She should have been doing her full sets of vital signs
4 to trend out vital signs throughout the visit of four hours or
5 approximately four hours.

6 Q. Okay, now where are the thermometers located in the
7 emergency room?

8 A. I don't remember if it was the nurse manager, Nurse
9 Farrelly, or if it was Ms. Doolittle, but they stated that
10 they're in each and every room in the emergency department.

11 Q. Okay, could you repeat that, I'm sorry. You're very
12 low.

13 A. Okay. I'm sorry.

14 Q. Say it again?

15 A. They're in each emergency room, the physical room.
16 Each room has their own thermometer.

17 Q. Okay, do you know where they're physically located? Are
18 they in drawers or on the wall, or where are they?

19 A. They didn't describe where they were, and I've never
20 been there so I don't know.

21 Q. Okay. Typically where are they?

22 A. The safest place for them is to be on the wall. They
23 usually have a holder of some sort.

24 Q. Okay. And did you -- in reading through the medical
25 records and/or the depositions, did you read anything that

1 would have been an impediment to Ms. New simply taking Kelly's
2 temperature?

3 A. No sir.

4 Q. All right. Ms. Knight, I've asked you the same
5 question as Ms. Doolittle. Did you read anything in her
6 deposition, or see anything in the medical records, or have
7 you been presented with any evidence, of any kind, that there
8 was any impediment for Nurse Doolittle to simply take her
9 temperature before she sent -- before she let her out the
10 door.

11 A. Well, from Ms. Doolittle it was actually more than just
12 the temperature, it was a full set of vital signs. There was
13 no pulse, there was no respiration, nor blood pressure at the
14 time she was discharged, so I mean to me it's just conscious
15 and willful disregard just to not do it.

16 Q. Okay. Are you telling the jury that they have to do it
17 exactly at twelve, as she was walking out of the door, or just
18 sometime -- what is your opinion on that?

19 A. Within fifteen minutes of them leaving. It could be at
20 11:45, you know, in fifteen minutes of taking her IV out and
21 getting her discharge instructions together, and then
22 physically leaves the department by twelve noon.

23 I mean it doesn't have to be as she's walking out or
24 something like that. It doesn't have to be quite that exact.

25 Q. Okay, fair enough. And would you, please, explain to

1 the jury why you take these vital signs, and why -- why do you
2 take more than one vital sign in your opinion?

3 A. The vital signs are a part of assessing the patient. I
4 mean you physically look at them, you touch them, you do all
5 the blood pressures and temperatures. It's a whole piece of a
6 puzzle, and if you remove pieces of puzzles you might not get
7 the whole picture. and part of our jobs is gathering signs and
8 symptoms, and physical assessments and vital signs, to create
9 that picture. In any emergency department the physicians and
10 the nurses work very close together, and the physicians are in
11 the department, the nurses are in the department. It's not
12 like being admitted to the hospital where the nurses are there
13 the majority of time and you're lucky to see the physician
14 maybe fifteen minutes out the day. It's a little bit
15 different scenario in the emergency department, so those
16 physicians depend on the nurses to do their part of the job,
17 and if there's something abnormal, or if something has
18 changed, then they expect the nurses to come communicate to
19 them, and we address it.

20 Q. All right, does the nurse have any role in advocacy for
21 the patient in the emergency room?

22 A. Or in the hospital, yes. That's exactly what I'm
23 talking about, is doing your part of the job, which is
24 assessing independently from the physician.

25 Q. I'm going to show you what has been marked as

1 plaintiff's Exhibit 4, and just show you the very first page
2 of that. Have you seen that before?

3 A. Yes sir.

4 Q. All right, and what is that?

5 A. That is a vital sign policy and procedure from Grand
6 Strand, effective date, April of 1978.

7 Q. Okay, and have you seen, any newer policies and
8 procedures prior to 2002?

9 A. No sir.

10 Q. All right, and tell us what this -- tell us what --
11 tell us -- explain to the jury, first of all, from the nursing
12 perspective in the emergency department, what these policies
13 and procedures are, why they're -- and they're -- they're
14 written.

15 A. Policy and procedures are in place to ensure the safest
16 care possible for somebody who comes in. These are pretty
17 much the bare minimum. That mean that you can't exceed that,
18 but this is the bare minimum that as -- as a nurse, as the
19 employee of that facility, that you should do for your
20 patient, at minimum. Doesn't mean that with -- in particular
21 abdominal pain, to have a minimum of two vital signs. Doesn't
22 mean that you can't do five sets of vital signs, you've just
23 went above and beyond. And vital signs, again, is a full set
24 of vital signs not just bits and pieces of it.

25 Q. Do you know of -- well can we get into the policy now

1 of vital signs, if you please. What does it say in this -- in
2 this -- let me ask you this first. Let me back up a second,
3 okay, Ms. Knight?

4 A. Uh huh (**indicating positive**)

5 Q. When the hospital has a policy and procedure for nurses
6 -- is this directed towards nurses?

7 A. Yes.

8 Q. When the hospital has a policy and procedure on taking
9 vital signs are the nurse -- do you have an opinion as to
10 whether or not to, to comply with the standard of care the --
11 does the nurse have a duty to follow the policies and
12 procedures?

13 A. Yes, we have a duty to do that. We have to follow
14 them.

15 Q. Can -- in your opinion can a nurse in an emergency
16 department just disregard the policy and procedure on vital
17 signs ---

18 A. No sir.

19 Q. ---Because they don't agree with them, or feel like
20 they should have to do them?

21 A. No sir. They are there in place for a reason.

22 Q. All right, do you see -- can you see on this particular
23 vital sign policy where it says a patient with a complaint of
24 chest pain or abdominal pain will have a minimum of two vital
25 signs reported?

1 A. Yes.

2 Q. All right, does that -- what does that do to your
3 opinion, if anything?

4 A. It supports what I have said, that at least she needed
5 to have a minimum of two sets of -- full sets of vital signs,
6 and while she had one when she presented, there was not a full
7 set from the time that she left, twelve noon.

8 Q. Okay, do you see -- have you read the entire policy ---

9 A. Yes.

10 Q. ---Other than the first page?

11 A. Yes.

12 Q. Is there any exception contained in that policy that
13 says if a nurse doesn't think she should -- she should -- she
14 needs to have a temperature taken, a patient needs to have
15 their temperature taken, that they can just not follow the
16 policy and procedure?

17 A. No. There's nothing in here like that.

18 Q. Okay now, as far as taking -- in Kelly Fay's case, as
19 far as taking vital signs, especially temperature -- I think
20 I've already asked you this but I want to make sure, did you
21 see anything anywhere in record, in the depositions, the
22 medical records, or anything else, that would have prevented
23 either Nurse Doolittle or Nurse New from taking Kelly's
24 temperature?

25 A. Nothing that I revealed in any of the things you

1 listed, no.

2 Q. Okay. And let's say -- assume for the purposes of my
3 question, Ms. Knight, that they had taken her temperature at -
4 - let's -- let me use 10:20, for example, and let's say she
5 had gone from -- assume for the purpose of my question her
6 temperature had gone, not way up high, but it had gone from
7 98.1 to let's say 99.9 or 100, or something like that -- or
8 something like that, do you have an opinion or not whether
9 that would be called -- and -- trending up?

10 A. Yes. That would be trending in an upward manner, yes.

11 Q. Okay, would that be -- would that, in any way, concern
12 you if she was trending up, even though it might be a high
13 fever yet?

14 A. Yes.

15 Q. Why?

16 A. Because kidney stones and a fever are an emergency
17 situation.

18 Q. Now let's move Sunday. All right, do you recall the
19 deposition testimony in regard to Sunday?

20 A. Which part?

21 Q. The part about, do you recall whether or not Kelly woke
22 up chills on Sunday morning?

23 A. Yes.

24 Q. Do you recall whether or not Sean Fay testified, under
25 oath, in his deposition, that he called the hospital?

1 A. Yes.

2 Q. And do you have any recollection -- and I'm not asking
3 you to give or repeat it verbatim, but do you have any
4 recollection of what Sean told whoever answered the phone,
5 whatever female voice answered the phone, be it nurse, doctor,
6 whomever, what he told them on the phone, and how they
7 responded to him?

8 A. I don't recall specifically what he said. I do recall,
9 paraphrasing of course, the response, was if -- you know,
10 basically if you feel the need to then you can come back;
11 we're open twenty-four seven kind of thing.

12 Q. Okay, do you have any opinions as to whether or not the
13 nurses in the E.R. that day -- assume for -- let me start
14 over. Assume for the purposes of my question that Sean Fay
15 has testified, both in his deposition and here in court before
16 you -- before you came, that he called and he told them they
17 had been there the day before, that she had a kidney stone,
18 that she had a fever, that she woke up chills, and -- and then
19 I think he just talked about the response. Do you have any
20 opinions in regard to that response to that -- to the
21 information that was provided for that nurse?

22 A. Part -- if you're going to take these phone calls you
23 have to determine if there is an emergent situation on the
24 other end of the phone. You can't just say, well we're open.
25 If there's somebody in dire need you -- you have to take the

1 call, you have to tell them how to do CPR, or whatever is
2 needed. You've got to make that determination. You just
3 can't say, yeah, we're open, just come on in if you feel you
4 need to.

5 Q. Okay. Do you believe it's within the standard of
6 nursing care to put the onus back on the patient to decide
7 whether or not they need to come in to the emergency room
8 after, in fact, they've been given discharge instructions that
9 say if you develop chills or fever call or come back?

10 A. I think Sean did what he needed to do, was to call.
11 Clearly Grand Strand's position at this time was that, you
12 know, call with any questions about your medical issues, we're
13 here to serve, that doesn't -- I mean that's to call. He did.

14 Q. Okay. I guess my question to you is, under the nursing
15 standard of care what's the point of calling if the response
16 is going to be, we're open 24/7; if she feels like she needs
17 to come back then come back, if not, follow up with your
18 doctor on Monday.

19 Q. I don't see the point.

20 Q. If they're going to put -- do you believe that they
21 should have -- do you have an opinion as to whether these
22 written discharge instructions should -- should have call or
23 go to the emergency room if you develop fever, intense pain
24 for a kidney stone specifically?

25 A. I think they should just come on back.

1 Q. You think ---

2 A. I don't think the call should even have been put in
3 there.

4 Q. Okay, but if they leave it in there, and they do, which
5 you can see that they did ---

6 A. Clearly.

7 Q. ---But to call or go -- call or go to the emergency
8 room then, if they do say call or go, then when you call do
9 you have an opinion as to whether or not they should give you
10 advice?

11 A. That leads you to believe that they will be giving you
12 advice.

13 Q. All right. Do you have an opinion whether or not there
14 would be anything wrong with simply reading what you had
15 already handed them in writing to them over the phone?

16 A. No.

17 Q. Does a nurse have a duty to take care of her patient as
18 best as she can?

19 A. Yes sir.

20 Q. Let's -- let's assume for the purposes of my question,
21 Ms. Knight, that the hospital had told the nurses, don't give
22 out telephone advice, okay, do you -- do you see an you
23 distinction between not giving out telephone advice to
24 something that calls in that you've never seen, or -- do you
25 see a distinction between that and someone that had been in

1 that emergency room the day before with a kidney stone.
2 obstructing, and the same nursing crew are going to be on that
3 Sunday? Do you see any distinction about giving -- tell them
4 what to do over the phone between those two scenarios, patient
5 they'd never seen, patient that was there the day before that
6 somebody could put the chart on?

7 A. Right, exactly. That's the difference, is that you can
8 go back and you can pull a chart with -- they were recently
9 there, present it to the doctor, and the doctor can give the
10 advice, versus someone just calling up with -- and you don't
11 get to physically assess them and everything. It's a big
12 difference.

13 Q. Do you think -- do you recall in Nurse -- in the
14 nurses' depositions, that they have no recollection of that
15 weekend?

16 A. I recall that, yes.

17 Q. You call that? Do you recall what you were just
18 testifying to is what they -- is what they said they would
19 have said has she called?

20 A. That's correct, yes.

21 Q. Had Sean called?

22 A. Yes.

23 Q. Do you have an opinion as to whether or not -- I think
24 I've already asked you that -- that was a deviation of care in
25 and of itself.

1 A. Yes.

2 Q. It was?

3 A. Yes, it was.

4 Q. All right, so how many -- how many chances do you see
5 here that they had to comply with the standard of care?

6 A. From what point?

7 Q. From Saturday to Sunday.

8 A. Several opportunities. Each time that either she had
9 the partial set of vital signs, or neglected the whole set of
10 vital signs altogether, and then the phone call again, when
11 Sean called back on Sunday.

12 Q. Okay, and do you feel as though you're qualified to
13 testify as to any urological matters, or physician matters, as
14 to whether or not this contributed to her death?

15 A. No, I'm just here to speak about the nurses.

16 Q. Okay, let me ask you this, Ms. Knight, are you charging
17 for your time here today?

18 A. Yes.

19 Q. Okay, how much do you charge?

20 A. A Hundred and Seventy-Five an hour.

21 MR. FOSTER: All right, if you'd be kind enough to
22 answer any appropriate question from opposing Counsel. I
23 thank you.

24 MR. TODD: May it please the court?

25 THE COURT: Cross-examination.

1 A. Right. That would be probably three to five days
2 later, though.

3 Q. Okay, do you get a preliminary report?

4 A. Within twenty-four to forty-eight hours, yes.

5 Q. And did you see -- have you seen anywhere in that
6 record where she had any infection?

7 A. Not that I recall.

8 MR. FOSTER: I think that's all I have, Your Honor.

9 THE COURT: All right.

10 MR. FOSTER: Bear with me just one second, please.

11 THE COURT: Very good.

12 Q. Do you recall those questions by Mr. Todd about Duke
13 and Georgetown, and mainly Duke and Georgetown, about what
14 their experts testified to in their deposition in regard to
15 discharge temperatures?

16 A. I don't recall specifically what they testified.

17 Q. Okay. Do you have any direct knowledge whether or
18 not -- what the discharge policies and procedures are at
19 Georgetown and/or at Duke?

20 A. No, I do not.

21 Q. Okay, do you know what the standard of care is required
22 for a nurse, for emergency room nurse?

23 A. Emergency room nurse's obligation, and minimum standard
24 of care, is to reassess, including a full set of vital signs
25 at discharge. That helps deem that that person is even stable

1 to be discharged.

2 Q. Okay, and just in case Mr. Todd didn't make this
3 abundantly clear, do you recall when he was questioning you
4 about -- that you didn't mention anything about Sunday while
5 they were questioning you in your deposition?

6 A. Correct.

7 Q. And then -- but -- and then do you recall that when I
8 asked you the question, in the same deposition, on the same
9 day, you did testify about Sunday, and the phone call?

10 A. I would assume that that would be true.

11 MR. FOSTER: That's all I have, Your Honor. Thank you.

12 THE COURT: Is there ---

13 MR. TODD: One question, Your Honor.

14 THE COURT: Is there a new issue brought up in
15 redirect? What is the new issue?

16 MR. TODD: It has to do with her opinion about
17 negligence at Cape Fear.

18 THE COURT: All right, you may.

19 RECROSS-EXAMINATION BY MR. TODD:

20 Q. It's your opinion that Cape Fear was negligent.

21 MR. FOSTER: Your Honor, that's not new. He went over
22 that the first time. It's nothing new.

23 THE COURT: What say you in response to that, Counsel?

24 MR. TODD: Well, he went over it, went over the
25 records, and confirm that our -- it's our opinion that she