THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

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

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

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, Stephen W. Law, D.O.,
Dr. Richard Young, M.D., and Grand Strand Urology, LLP, ... Defendants,

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

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

RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT SEAN D. FAY TO THE APPELLANT GRAND STRAND REGIONAL MEDICAL CENTER, LLC

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COUNTER-STATEMENT OF THE CASE

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

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

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

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GRAND STRAND'S MOTION FOR A NEW TRIAL BASED UPON THE TRIAL COURT'S INSTRUCTIONS TO THE JURY

GSRMC contends that the trial court gave an erroneous jury charge which "improperly elevated the standard of care owed by a hospital in a medical malpractice action and contradicts the law of South Carolina." (GSRMC App. Br. p. 9). GSRMC contends the charge "forced the jury to apply a legally deficient standard to the facts, and, thus, Grand Strand suffered prejudice from the erroneous charge." (GSRMC App. Br. p. 9). These arguments should not be persuasive.

To begin with, the trial court's statement of the law is not erroneous. Further, insofar as the Court may determine that the charge about which GSRMC complains is in error, GSRMC has not demonstrated prejudice. This Court should affirm.

A. THE CHARGE IS NOT ERRONEOUS

The trial court gave an extensive charge to the jury. As part of the charge the judge stated:

> I further charge you under South Carolina law that a hospital has an absolute duty to provide competent medical care in its emergency room and this duty cannot be delegated to someone else.

(R. p. 873, ll. 18-21). GSRMC objected to the charge on the ground that the charge "creates the impression that the hospital is almost an insurer of its competence, and we would object to it on that ground." (R. p. 893, ll. 11-18). Mr. Fay contended the charge was "good law." (R. p. 894, ll. 13-16).

On appeal, GSRMC contends the jury charge "improperly elevated the standard of care owed by a hospital in a medical malpractice action" in violation of South Carolina law. GSRMC contends the subject instruction "failed to convey the current and correct law as set forth by our Supreme Court and affected the outcome of the trial, prejudicing Grand Strand." (App. Br. p. 9). This argument should not be persuasive.

GSRMC's argument centers on the case of *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000) (*Simmons II*), which affirmed as modified this Court's opinion in *Simmons v. Tuomey Regional Medical Center*, 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998) (*Simmons I*).

In *Simmons I*, this Court addressed the issue of a hospital's liability for negligence that occurred in its emergency room where the doctors were independent contractors and not direct employees of the hospital. This Court relied upon the rule that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." 330 S.C. at 118, 498 S.E.2d at 409. The Court stated:

> We conclude that a hospital's duty to its emergency room patients to provide competent medical care has evolved into an absolute duty that is incapable of being delegated. Consideration of the effect of public policy in the medical care arena leads us to this conclusion.

Id. The Court added, "The change in public reliance and public perceptions, as well as the regulations imposed on hospitals, has created an absolute duty for hospitals to provide competent medical care in their emergency rooms." 330 S.C. at 122, 498 S.E.2d at 411. The Court held "that hospitals have a nondelegable duty to render competent service to

the patients of their emergency rooms." 330 S.C. at 124, 498 S.E.2d at 413.

The Supreme Court granted review and affirmed as modified. The Supreme Court stated:

> This case presents the novel issue of whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that *it may not avoid liability* for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation.

341 S.C. at 35, 533 S.E.2d at 314 (emphasis added). The real focus in the case was the principle that a person may delegate a duty, but the delegating person remains liable for the breach, so that it is actually liability, not the duty, that is not delegable. 341 S.C. at 42, 533 S.E.2d at 317. The Supreme Court stated:

> We find Tuomey Regional's arguments unpersuasive. The cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances *may not assign those duties to someone else* and then expect to walk away unscathed when things go wrong. A principle that applies in cases of poorly repaired brick floors and sloppily loaded cargo certainly applies to situations in which people must entrust that most personal of things, their physical well-being, to physicians at an emergency room intimately connected with and closely controlled by a hospital. *However, as explained further below, we do not believe it is necessary, as the Court of Appeals did, to impose an absolute nondelegable duty on hospitals.*

341 S.C. at 44, 533 S.E.2d at 318 (emphasis added). The Supreme Court found that "[g]iven the fundamental shift in the role that a hospital plays in our health care system, the commercialization of American medicine, and the public perception of the unity of a hospital and its emergency room, we hold that a hospital owes a nondelegable duty to render competent service to its emergency room patients." 341 S.C. at 50, 533 S.E.2d at

322. The Supreme Court added:

> However, we conclude it is not necessary, as the Court of Appeals did in the cases at hand, to impose an *absolute* nondelegable duty on hospitals. Instead, we adopt the approach expressed in Restatement (Second) of Torts: Employers of Contractors § 429 (1965). That section, sometimes described as ostensible agency, provides:
>
> > One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.
>
> Section 429 applies not only when the injured person accepts services in the belief they are being rendered by the independent contractor's employer, but also when a third person accepts such services on the injured person's behalf and reasonably believes the services are being rendered to the injured person by the independent contractor's employer. See section 429 cmt. a; Restatement (Second) of Torts, Introductory Note to §§ 416-429 at p. 394 (explaining that various nondelegable duties are imposed "in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor").
>
> Under section 429, the plaintiff must show that (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. When the plaintiff does so, the hospital *will be held vicariously liable* for any negligent or wrongful acts committed by the treating physician. The hospital may attempt to avoid liability for the physician's acts by demonstrating the plaintiff failed to prove these factors.

341 S.C. at 50-51, 533 S.E.2d at 322 (emphasis added).

Hence, the narrow holding of this case is that it is unnecessary to describe the duty a hospital owes when its liability is predicated upon the negligence of an independent

contractor as "absolute." That is, the issue centers upon the hospital's liability when a patient believes they are dealing with a direct employee of the hospital but are truly dealing with an independent contractor. The Supreme Court held that in those circumstances the Court found it unnecessary to impose an "absolute" duty, and a plaintiff may recover only if they can demonstrate (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; and (3) a person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee. The Court very clearly stated that when a plaintiff proves each of these factors "the hospital *will be held vicariously liable* for any negligent or wrongful acts committed by the treating physician." 341 S.C. at 50-51, 533 S.E.2d at 322.

In this case, GSRMC's liability is not based upon the negligence of an independent contractor. Rather, its liability is based upon the negligence of its direct employees, the nurses in the emergency room. There is no need to go through the *Simmons* analysis here, as GSRMC's counsel pointed out below. (R. p. 893, ll. 14-15).

Accordingly, the charge here forced the jury to do nothing, since the issue of nondelegable duty was not before them. Instead, the jury was provided lengthy instructions that correctly outlined the applicable law for a principal's direct liability for agents and they followed those instructions in rendering their verdict.

This Court should reject GSRMC's argument that reversal is required in this case under *Simmons II*. The Court should affirm the trial court's denial of GSRMC's new trial motion on this ground.

B. EVEN IF THE CHARGE IS ERRONEOUS, GSRMC HAS NOT DEMONSTRATED PREJUDICE

Even if the trial court erred in using the word "absolutely" in charging the duty a hospital owes to provide competent medical care in its emergency room, in light of the extensive instructions the court gave this Court should find that GSRMC has failed to establish prejudice when the charge is reviewed as a whole.

When an appellate court reviews an alleged error in a jury charge, it must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249 (2009). If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *Ardis v. Sessions*; *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). This holistic approach to jury instructions is linked to the principle of appellate procedure that "[a]n error not shown to be prejudicial does not constitute grounds for reversal." *Ardis*, 383 S.C. at 532, 682 S.E.2d at 250-251; *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App.1997); *see also Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (noting that a jury charge, even if erroneous, on a matter not in issue, is not always considered prejudicial).

This is a longstanding rule in this state. *See, e.g.*, *Westinghouse Electric & Mfg. Co. v. Glencoe Cotton Mills*, 111 S.C. 364, 98 S.E. 128 (1919) (where trial court made erroneous statement of law in 17-page jury charge Supreme Court refused to reverse where appellant failed to demonstrate the charge was prejudicial; Court held charge must be considered in its entirety and added "[i]n a charge of such length, it is not surprising if

expressions were used, which, standing alone, might be regarded as erroneous"). This approach remains vibrant even today. *E.g.*, *City of North Myrtle Beach v. East Cherry Grove Realty Co., LLC*, 397 S.C. 497, 725 S.E.2d 676 (2012) (judge's charge to the jury must correctly state the law, but reversal is not warranted when considered as a whole, the charge adequately covers the applicable law under the facts of the case). Accordingly, even if there is some error or misstatement of the law in the charge, this Court must review that error or misstatement against the backdrop of the entire charge.

This Court applied this rule in *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). In *Pope*, the trial court erroneously included the standard of willful, wanton and reckless conduct in the definition of simple negligence. The appellants in *Pope* asserted this effectively required the jury to find the recklessness necessary to award punitive damages and suggested to the jury that the court had already determined that Appellants were willful, wanton, and reckless. This Court stated:

> In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the trial court's decision absent an abuse of discretion. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). Furthermore, an appellate court will review the charge as a whole. *See Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (finding a jury charge should be reviewed as a whole, and if the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error). Here, although the trial court's initial language in instructing the jury on negligence may have been a misstatement of law, the court then extensively defined willful, wanton, and reckless conduct and instructed the jury on the difference between mere negligence and willful, wanton, and reckless conduct. In reading the charge in its entirety, we find no prejudice to Appellants. *See Priest v. Scott*, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (finding an alleged error in a jury charge must be prejudicial to warrant a new trial).

Pope, at 414, 717 S.E.2d at 770-771. *See, e.g., Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) (erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party); *Harris v. University of South Carolina*, 391 S.C. 518, 706 S.E.2d 45 (Ct. App. 2011) (an erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction). *See also Wiggins v. Thomas*, 264 S.C. 360, 215 S.E.2d 426 (1975) (even if charge was erroneous, there must be reasonable grounds for supposing that the jury was misled and would have reached a different verdict).

In this case, the trial court gave extensive jury instructions regarding the duty owed by the defendants in this case. These included the following:

> Now, in this case as you are aware, there are two Defendants. There's a physician and a hospital, and under South Carolina law, **a hospital, as a corporation, is liable for the actions of its agents, servants, or employees while those agents, servants, or employees are acting within the scope of their authority**. (R. p. 858, ll. 13-18)
>
> * * *
>
> [E]ach of the two Defendants must be considered separate in your deliberations. (R. p. 859, ll. 11-12)
>
> * * *
>
> Now, let's talk a little about the law. The Plaintiff claims that the Defendants here committed medical malpractice or professional negligence, and malpractice is the failure to treat a patient following a good and accepted medical practices resulting in harm to the patient as a form of carelessness or negligence.
>
> Now, in order to recover for medical malpractice, the Plaintiff must first prove by a preponderance or greater weight of the evidence what was the standard of care the Defendants owed to the Plaintiff in treating the Plaintiff, in other words, what was the standard of care.

When a doctor, nurse, or hospital employee, and I'm going to refer to them in this charge, I'm going to use the term provider, which would encompass of those, when a provider treats a patient, the law does not require absolute accuracy either in practice or in decision-making. The law does not hold the provider to a standard of perfection. It does not even require the highest degree of care and skill of which the human mind is capable.

The law does require that the provider use that degree of knowledge, care, and skill as ordinarily used by providers in good standing under the same or similar circumstances and that the provider follow the generally accepted practices and procedures in the profession. (R. p. 867, ll. 2-25)

The degree of skill and care a provider must use is that which would be used by a competent provider in the Defendant's field of medicine and not that which would be exercised by the profession generally. (R. p. 868, ll. 1-4)

A provider must use reasonable care and diligence in using skill and applying knowledge. What is reasonable care, skill, and diligence depends largely on the circumstances of each particular case as you – which is obvious, taking into account the risk and dangers to be apprehended and guarded against in that particular case and, therefore, such care and attention must be given as are required by the circumstances of the particular case. (R. p. 868, ll. 5-12).

* * *

A physician who has undertaken the treatment of a patient whose condition known to the physician or should be known is such that without continuous or frequent expert attention the patient is likely to suffer injurious consequences must either render such attention to himself or herself or see that some other competent provider does so. (R. p. 868, l. 23 - p. 869, l. 3).

Now, so first the Plaintiff must prove what was the standard of care. Second, the Plaintiff must prove that the Defendant or Defendants negligently departed from the standard of care in treating the Plaintiff. Negligence is the failure to do what an ordinarily careful provider would have done under the same or similar circumstances, or it's the doing of something that an ordinarily careful provider would not have done under similar circumstances, or perhaps both. (R. p. 869, ll. 4-11).

A provider's duty in treating a patient is to be measured by both the provider's skill and diligence. If by the lack of required skill you find that the Defendants failed to properly treat the patient so that the patient is injured or damaged as a result, then the Defendants would be responsible for any injury proximately caused to the patient. (R. p. 869, ll. 12-17)

The Defendant would also be responsible if having the required skill the Defendant negligently fails to use that required skill or is not as careful and diligent in the treatment of the patient as the provider should be. A provider, though, is not an insurer of a cure or even of a positive result. Therefore, the mere fact that a treatment does not benefit a patient or that it even harms a patient does not of itself mean that the Defendant was negligent. A bad result, injury, or failure to cure is not by itself enough to show that the provider was negligent. (R. p. 869, l. 18 - p. 870, l. 2).

If you find that the Defendant used due care and skill in treating the patient and followed generally recognized practices and procedures and despite this the patient suffered damage, injuries, or death, you should return a verdict for the Defendant. (R. p. 870, ll. 1-7).

Now, similarly, a provider's mistake or error in making a decision alone doesn't constitute negligence either. (R. p. 870, ll. 8-9)

* * *

The difficulties and uncertainties in the practice of medicine and the unpredictable variations in the response to treatment are such that no provider can guarantee a result. Where there is more than one recognized diagnosis or treatment and no one of them is used exclusively and uniformly by all providers in good standing is not negligence for a provider in making the decision the choose one of the approved methods even when the choice later turns out to be a wrong selection. (R. p. 870, ll. 15-22).

* * *

Just because another provider might have used a different course of treatment doesn't make the Defendant negligent. (R. p. 871, ll. 5-6).

* * *

All right, now let's talk about proximate cause. I've used that term

a couple of times, and the third thing the Plaintiff has to prove in a medical negligence claim is that the Defendant's negligence proximately caused the Plaintiff's damages. Again, that word is approximate. It is proximate, and proximate cause is something that produces a natural chain of events that in the end brings about the injury or the death. It is the direct cause of the injury. (R. p. 871, ll. 15-22).

* * *

The Plaintiff must also prove legal cause. Legal cause is proven by showing that the injury was foreseeable. Now, this means that the injury occurred as a natural and probable consequence of Defendant's negligence. * * * However, the Defendant cannot be held responsible for something which could not have been expected to happen. (R. p. 872, ll. 3-12).

* * *

I further charge you under South Carolina law that a hospital has an absolute duty to provide competent medical care in its emergency room and this duty cannot be delegated to someone else. (R. p. 873, ll. 18-21).

* * *

I further charge you under South Carolina law that South Carolina has adopted a national standard of care for physicians and nurses. * * * The standard of skill and care required of such a physician is determined by reference to the practice within these fields of medicine rather than by practice among physicians in some specific locality. (R. p. 874, ll. 3-11).

* * *

All right, now, as you know, there's more than one Defendant in this case, and I charge you that there are two Defendants in the case, and you're aware of that, both of whom are alleged to have committed medical negligence. The case of each Defendant and the evidence and the law concerning that Defendant should be considered separately by you and individually, and the verdict form will set this out for you. * * * (R. p. 875, ll. 4-10).

Your verdict doesn't have to be the same for both Defendants. The fact that you may find for or against one Defendant does not control and

should not control your verdict as to the other. Where more than one person is alleged to have committed medical negligence, if the evidence warrants it, you may find in favor of one Defendant and not the other, or you may find for the Plaintiff against both Defendants, or you may find that neither Defendant is liable to the Plaintiff. (R. p. 875, ll. 12-20).

* * * You must take each Defendant and consider the evidence as to that Defendant.... (R. p. 875, ll. 22-23).

* * *

Now, let's talk about the burden of proof. The mere fact that some bad result here occurs standing alone doesn't permit the jury to automatically conclude that the claimed damages were proximately caused by the Defendant's actions. (R. p. 878, ll. 15-18).

* * *

And in a survival action in determining the amount of compensation to be awarded for injuries suffered by the Plaintiffs, if you find that the Defendants were negligent in causing Plaintiff's injuries, then it is proper for you to consider, should you find applicable from the facts of the case, the following area of damages. (R. p. 881, ll. 7-12).

(Bold added). The trial court also gave general charges on comparative negligence. (R. p. 875, ll. 1-3; p. 876, ll. 2-8; l. 18 - p. 878, l. 5). The court described the burdens of proof. (R. p. 878, l. 23 - p. 880, l. 13). This included an instruction that if the scales were even or tipped ever so slightly for the Defendant, then "Plaintiff has failed to meet the burden of proof on that party, and your verdict should be for that Defendant."(R. p. 879, l. 22 - p. 880, l. 1).

The trial court's charge covered thirty-two (32) pages of the transcript. (R. p. 856 - p. 888). The charge to which GSRMC objects focuses on one word in one paragraph about halfway through the instructions. In light of the extensive instructions on the burden of proof the plaintiff bore as well as charges permitting the jury to find for the

Defendant, this Court should find, when viewed as a whole, any error in giving the "absolute duty to provide competent medical care" instruction is not prejudicial to GSRMC. The charge does not make GSRMC an insurer, nor does it mandate a result.

The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law. *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011). The Court should affirm the trial court's discretionary decision to deny a new trial for GSRMC on this ground.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GRAND STRAND'S MOTION FOR A NEW TRIAL BASED UPON THE TRIAL COURT'S DISCRETIONARY RULING EXCLUDING EVIDENCE OF MR. FAY'S EXTRAMARITAL AFFAIR

Grand Strand contends the trial court abused its discretion in excluding evidence of an extramarital affair Mr. Fay had in 1999 with a co-worker three years prior to Mrs. Fay's death. (GSRMC App. Br. p. 14-18). GSRMC claims the evidence was relevant to the issue of damages and was not unduly prejudicial, and its exclusion "allowed only a one-sided picture of the marriage to be presented to the jury in this matter" and that it is entitled to a new trial. (GSRMC App. Br. p. 18). The Court should not be persuaded by these arguments.

Mr. Fay's counsel moved *in limine* to exclude the evidence of the 1999 extramarital affair. Counsel noted that the only evidence was that the affair was brief, Mr. Fay was not "caught" but instead confessed the affair to Mrs. Fay, they went to marriage counseling, and at the time of her death, the Fays had gotten past the affair and were once again happily married. (R. p. 135, l. 19 - p. 136, l. 5; p. 138, l. 10 - 140, l. 7). That motion was made prior to the opening statements and the trial court took it under advisement. (R. p. 132, l. 23 - p. 140, l. 23).

Following opening statements, the trial court made the following ruling:

> There has also been an issue of whether or not the Plaintiff's alleged affair can be brought into evidence on the issue of credibility and believability. I'm going to deny the Defendants the right to bring that evidence in, and exclude that evidence. *I do that for this reason, it's clear from the opening arguments that this case is really about liability. It's not about damages*. This issue of an affair really goes to damages, in the Court's opinion, and whether or not the loss of the spouse is as great as one may perceive that it is. This is not for the Court to say, this is just how

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

(Emphasis added) (R. p. 258, l. 10 - p. 259, l. 4). Dr. Young (R. p. 388, l. 17 - p. 389, l. 21) and GSRMC (R. p. 390, ll. 12-19) both raised the issue later in the trial and GSRMC proffered some evidence on the issue (R. p. 138, l. 7 - p. 139, l. 8).

Whether to admit or exclude this evidence was within the trial court's sound discretion. *See North Greenville College v. Sherman Construction Co., Inc.*, 270 S.C. 553, 557, 243 S.E.2d 441, 442 (1978) (trial court has broad discretion to determine the admissibility of evidence, and its decisions are reversed only when they constitute an abuse of discretion that amounts to an error of law). This Court should not disturb that discretionary ruling in this case.

Furthermore, South Carolina case law supports the trial court's decision. In *Wooten v. Amspacher*, a survival action, the plaintiff contended the trial court erred in admitting evidence concerning her separation from her husband (the decedent) prior to his death and her subsequent marriage after his death. The Supreme Court noted that it had held "this evidence" was not admissible in a wrongful death action where the issue was the widow's or widower's damages. 279 S.C. 325, 326, 307 S.E.2d 232, 233 (1983), citing *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470, 472 (1972). Otherwise, the evidence would require a speculative comparison of the merits of the first spouse and the second

spouse. *Wooten. See also Moultrie v. Medical University of South Carolina*, 280 S.C. 159, 311 S.E.2d 730 (1984) (citing *Smith* and *Wooten*).

Like the evidence of separation and remarriage in *Wooten* and *Smith*, the evidence that three years before Mrs. Fay's death Mr. Fay had an extramarital affair would permit the jury to engage in speculation and perhaps decide the case on an improper basis. If evidence that spouses had separated at the time of the death was inadmissible, as the Court held in *Wooten*, then surely evidence that an affair that happened three years earlier against the fact that the affair was admitted and the parties remained together should not be admissible.

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

At the time of her death, Mrs. Fay was still married to Mr. Fay and was living in the same home with him. They had no children and very little else tying them together other than the strength of their marriage, which survived the extramarital affair. Also, it

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

Additionally, evidence that the Fays experienced marital difficulties was admitted to the jury through Dr. Kommu's records. (R. pp. 918 - 933; R. p. 177, l. 1). Dr. Kommu's records note the following:

Aug. 18, 1999 The Fays "have also been having some mild marital difficulties." (R. p. 924)

Sept. 9, 1999 Noting Mrs. Fay felt Mr. Fay was "profoundly depressed." "She is unable to discuss a lot of the issues that are pertinent between them with him very well. The problems identified in her last visit continue to be a problem." Dr. Kommu encouraged Mrs. Fay to have Mr. Fay meet with Dr. Kommu "to discuss the underlying marital difficulties and possible treatment for depression" (R. p. 925)

Dec. 15, 1999 Noting "relationship with her husband has improved though she still continues to feel he is fighting depression on his own in spite of his reluctance to initiate treatment." (R. p. 926)

Jan. 24, 2000 "3. Patient having marital difficulties. They are undergoing counseling at this time and she will let me know if I can be of any other assistance." (R. p. 927)

Mar. 29, 2001 "She has had a history of depression in the past, likely due to marital difficulties." (R. p. 931)

These records went to the jury. (R. p. 893, ll. 1-7). Thus, the jury was provided information that during August through January 2000 the Fays were having marital

difficulties.

Finally, the trial court's decision under Rule 403, SCRE, is sound. *See* Rule 403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). The appellate court will uphold a trial court's application of Rule 403 unless it finds the trial court has committed an abuse of discretion. *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999). This is true even if this Court may have reached a different result. As this Court noted in *Hunter*:

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

Hunter, at 102-103, 515 S.E.2d at 266. GSRMC does not make a compelling case that the trial court abused its discretion in excluding the evidence under Rule 403.

GSRMC speculates that the jury "could have viewed the affair evidence as proof that [Mr. Fay] did not value Plaintiff Fay's companionship during the marriage, and, as a result, valued [Mr. Fay's] loss of companionship accordingly. The jury could have

declined to award damages for this element, or awarded damages in a smaller amount." (GSRMC App. Br. p. 15). This argument should not be persuasive.

First, as GSRMC points out, Mrs. Fay was a plaintiff in this case. Although the trial court instructed the jury it could consider Mr. Fay's loss of companionship, there was no objection to this instruction. Evidence that raises the speculation that Mr. Fay "did not value [Mrs. Fay's] companionship during the marriage" is completely irrelevant to Mrs. Fay's damages for the suffering she underwent, economic damages and the fact that her life was cut drastically short by the defendants' actions.

Second, the jury returned a general verdict here. GSRMC's contention that exclusion of the evidence "influenced the jury verdict" is speculation because the jury was not asked to allocate its verdict between Mrs. Fay's damages for her suffering and death and Mr. Fay's damages for his loss of her companionship. GSRMC's argument that the evidence would have impacted the general verdict here is speculation.

Third, the trial court made two rulings here. Initially, the court ruled that the case was really about liability, not damages, so that the evidence was not relevant to the real issue in the case: liability.[1] The court then separately ruled that even if the evidence had some relevance to an issue in the case (which was doubtful), the probative value was outweighed by the risk of undue prejudice as contemplated by Rule 403. These discretionary rulings are correct and this Court should not disturb them.

GSRMC contends this Court's precedent is instructive on the issue. (GSRMC

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[1] In fact, GSRMC asserted elsewhere in its brief that "this matter hinged exclusively on the standard of care owed to Plaintiff Fay." (GSRMC Br. p. 9).

App. Br. p. 16) citing *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The Court should reject this argument.

In *Vereen*, decedent was murdered as part of an insurance scam. Liberty Life Insurance Company denied payment of benefits because of the fraud associated with the policy application and because decedent never knew about the policy. His widow as personal representative sued Liberty as well as the two individuals who attempted the fraud for wrongful death and survival on the theory that their actions led to decedent's wrongful death. The trial court directed a verdict for defendants on the survival claim but submitted to the jury the issue of Liberty's liability and the issue of damages for wrongful death. The jury returned a verdict for $3,565.95 actual damages and $30,026.30 punitive damages against the individual defendants but exonerated Liberty. The estate moved for JNOV as well as a new trial on the ground that the evidence as a matter of law supported a verdict against Liberty. The trial court denied the motion and the estate appealed.

On appeal, Vereen's representatives claimed among other things that the trial judge erred in admitting evidence of an earlier guilty plea by Vereen to possession of marijuana. The Court of Appeals held there was no error with respect to admission of the guilty plea. First, the Court noted that the admission or exclusion of evidence is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse and prejudicial legal error. The Court concluded "[n]o such showing has been made here." *Id.*, at 430, 412 S.E.2d at 429. The Court stated:

> As a beneficiary in this wrongful death action, the questions of

> whether Vereen's wife was entitled to damages, and if so how much, were properly before the jury. The potential damages included loss of companionship and loss of society. *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972). Vereen's wife testified that she and Vereen were very close, that they talked about everything, and that he was in no trouble. The existence of Vereen's guilty plea, about which she did not know, could have been viewed by the jury as evidence that Vereen and his wife were not as close as she claimed. Such evidence was relevant to the issue of damages. Its admission was not an abuse of discretion. *See Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App.1985).

Vereen, at 430, 412 S.E.2d at 429-430. In a footnote the Court stated:

> Although Vereen's wife subsequently said she did not deny he had a criminal record, but instead that she knew of none, for all the jury knew she and Vereen were very close and discussed everything, and she was correct that no criminal record existed. Evidence of the guilty plea was properly admitted to refute her assertion.

Vereen, at 430, 412 S.E.2d at 430. Thus, this Court was affirming the trial court's discretionary ruling regarding the admission of the evidence.

Furthermore, the evidence sought to be admitted (evidence demonstrating the couple was "not that close") was perhaps relevant to the issue of whether they were, in fact, close at the time of Vereen's death and to directly refute the widow's claim that they discussed "everything."[2] The Court of Appeals agreed that the jury could infer that by not telling his wife about his prior guilty plea to marijuana possession, Vereen was not as close to his wife as she claimed him to be.

In this case, the Defendants offered the evidence to demonstrate to the jury that Mr. Fay did not value Mrs. Fay as much as he claimed. The argument essentially goes that once a couple has marital discord, even discord involving infidelity, then they are

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[2] It is telling that *Vereen* has never been cited for this proposition in any subsequent cases here or anywhere else.

forever branded and can never truly forgive each other. The defendants would at least have liked to have made this argument to the jury to incite a decision based upon improper motives, that is, judging Mr. Fay harshly for a mistake he made three years earlier – a mistake he confessed and that Mrs. Fay forgave both in her eyes and the eyes of the law.

In any event, like the Court in *Vereen*, this Court should defer to the sound discretion of the trial court judge and find GSRMC has failed to demonstrate a clear showing of abuse and prejudicial legal error.[3]

GSRMC cites to *Carroll v. Moran*, 17 F.3d 787 (5th Cir. 1994) as supporting its position. (GSRMC App. Br. p. 17). *Carroll*, however, is distinct from this case in a meaningful way.

In *Carroll*, plaintiff brought a medical malpractice action alleging wrongful death of his brother. The jury rendered a "take-nothing" verdict in favor of the defendant doctor. Plaintiff appealed and the Fifth Circuit Court of Appeals affirmed.

On appeal, plaintiff raised several issues including the trial court's admission of records from Newhaven House, a treatment center for alcohol and drug abuse. Decedent's Newhaven House records contained references to decedent's smoking, drinking, drug use, lustful sexual behavior, and marital infidelity. The appellate court held the trial court did

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[3] In addition, the trial court in *Vereen* actually admitted the evidence and there is no indication the trial court engaged in a Rule 403-like analysis with regard to the evidence. Because the case pre-dated the 1995 effective date of the SCRE (Rule 1103, SCRE) the trial court would not have applied Rule 403. However, Rule 403 was consistent with existing South Carolina law. See Rule 403, SCRE, Notes.

not err in admitting the records because (1) they were relevant to possible causes of decedent's death (severe coronary heart disease); and (2) they were relevant to the issue of damages since the defendant "was entitled to show that [decedent] was not a healthy person and that his intemperance might have resulted in a reduced life expectancy." 17 F.3d at 791. The Court added that "[m]oreover, evidence of marital discord is probative of the extent of the survivor's noneconomic loss as a result of the wrongful death." *Id.* The Court cited to a Mississippi Supreme Court decision in support of this rule. *Id.*, *citing McGowan v. Estate of Wright*, 524 So.2d 308 (Miss. 1988).

In *McGowan*, the widow and the decedent had not lived together for years and had not spoken for the last 11 years of his life. In fact, the decedent had been living with another woman for 15 years and had held her out to be his wife. The Mississippi Supreme Court held "[t]he jury obviously concluded that appellant had no loss of society and companionship and, therefore, suffered no damage." 524 So.2d at 311.

The point is this. In *Carroll*, the evidence demonstrated behavior that was on-going at the time (smoking, drinking, drug use, lustful sexual behavior, and marital infidelity) which amounted to marital discord existing at the time of the decedent's death. The same is true of the case upon which *Carroll* relied, *McGowan*. In this case the only evidence was that the extramarital affair had happened three years earlier, had been confessed and had been forgiven, and at the time of Mrs. Fay's death the Fays were together and there was no marital discord resulting from the affair.

GSRMC cites further to *Countryman v. County of Winnebago*, 135 Ill. App.3d 384, 481 N.E.2d 1255 (1985) as instructive on this issue. (GSRMC App. Br. p. 17).

Countryman, however, is also meaningfully distinct from this case.

In *Countryman*, the evidence the defendant sought to admit was that the decedent was having an affair with another woman at the time of his death and the decedent's wife found out about it. In fact, the Illinois Court phrased the issue as follows: "The narrow question then is whether evidence that Margaret Countryman had found Richard Countryman in bed with another woman had any tendency to establish that the consortium was worth less than if that event had not occurred." 135 Ill. App.3d at 388, 481 N.E.2d at 1259. The Illinois Court of Appeals added:

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

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

In this case, the only evidence was that the affair had occurred three years prior,

that Mr. Fay had confessed the affair to Mrs. Fay, and that they had put the affair behind them at the time Mrs. Fay died at the hands of the Defendants. Unlike the situation in *Countryman*, the affair was not ongoing and Mrs. Fay did not find Mr. Fay in bed with his paramour. The trial court appropriately excluded the evidence and denied the new trial motion.

GSRMC also cites to *Morales v. Superior Court*, 99 Cal. App.3d 283, 160 Cal. Rptr. 194 (1979) in support of its argument. (GSRMC App. Br. p. 17). Once again, however, *Morales* is meaningfully distinct from this case.

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

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

99 Cal. App.3d at 288, 160 Cal. Rptr. at 197. The Court added:

> However, not all such evidence is necessarily relevant. Some limitation of the time to be covered by the discovery may properly be required. What happened 10 years before the decedent's death may or may not have relevance. This is so because *the appropriate inquiry in the wrongful death case is the nature of the relationship at date of death.* We do not attempt to say [w]hat period is proper. What is proper in a given case depends upon the facts of the case. The two-year limitation imposed by the trial court in this case does not appear to us to be unreasonable or improper. *Of course, we are discussing this matter for purposes of discovery only.* As observed in *Fults v. Superior Court* (1979) 88 Cal. App.3d 899 at page 902, 152 Cal. Rptr. 210 at page 212. " . . . relevancy at

> trial and relevancy for purposes of discovery are two different things. 'An appellate court cannot reverse a trial court's grant of discovery under a "relevancy" attack unless it concludes that the answers sought by a given line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial.' (*Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 173, 84 Cal. Rptr. 718, 727, 465 P.2d 854, 863; Code Civ. Proc., ss 2016(b), 2031.)" (*Fults v. Superior Court*, supra, 88 Cal. App.3d 899, 902, 152 Cal. Rptr. 210, 212.)

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

GSRMC cites next to a Florida case for the argument that exclusion of the evidence "would authorize the perpetration of a fraud upon the jury." (GSRMC App. Br. p. 18), citing *Adkins v. Seaboard Coast Line R.R. Co.*, 351 So.2d 1088, 1093 (Fla. Ct. App. 1997). The Court should not be persuaded by this argument.

First, *Adkins* is meaningfully distinct from this case. In *Adkins,* the decedent had been living with his alleged paramour for six months prior to his death. The paramour testified that shortly before his death the decedent promised that he would divorce his wife and marry the paramour. She also testified about decedent's "credible explanation for having to wait." *Id.*, at 1092. The Florida Court of Appeals stated the novel issue presented as "whether evidence that the decedent was going to divorce his wife is admissible in a wrongful death action brought by the decedent's wife." *Id.* The Court

found the evidence "sufficiently probative of the decedent's intent and probable future actions to warrant consideration by the jury in assessing the survivor's damages." *Id.* The issue was going to come up on retrial (Court reversed on a separate issue) and the Court advised the trial court "Evidence on this issue is always subject to the rules of evidence limiting unnecessary evidence on a collateral issue." *Id.* Importantly, the Court added:

> A contrary ruling would authorize the perpetration of fraud upon the jury. In the case of *Florida Central and Penninsular Railroad Co. v. Foxworth*, 41 Fla. 1, 25 So. 338 (1899), the Florida Supreme Court recognized the importance of allowing the presentation of an honest and accurate picture of the marriage relationship between the decedent and the surviving spouse. There the court observed that the "jury may properly take into consideration the loss of the comfort, protection, and society of the husband in light of all the evidence in the case relating to . . . the marital relations between the parties at the time of and prior to his death." (Emphasis added) 25 So. at 348. We cannot allow the wrongful death claimant to paint a rosy picture of the marital relationship while the defendants' hands are bound, preventing rebuttal. A jury should not be misled to believe that a marriage at or past its breaking point was as zealous as a honeymoon merely because the marriage partners had not sought legal dissolution prior to the decedent's death.

Adkins at 1093. The Court added:

> We acknowledge the potential for abuse of evidence of domestic discord. Our legal system, however, provides many safeguards against such abuse. Impeachment of the witness testifying to the decedent's intent to divorce his wife is the established method of testing whether the decedent actually expressed such an intent. Rebuttal evidence can be presented to show that if the decedent expressed such an intent, it was not his true intent, or to show that he later changed his mind or would not have acted in accordance with this expressed intent. A motion *in limine* would test not only threshold relevancy and whether a jury could reasonably believe that under the circumstances the expressed intent was honest, but also whether the probative value of the evidence is outweighed by danger of unfair prejudice.

Adkins, at 1093.

Unlike *Adkins*, Mr. Fay did not have a paramour at the time Mrs. Fay was killed. Furthermore, the evidence was not presented to show Mr. Fay intended to leave Mrs. Fay at any point, especially at the time of her death three years after the admitted affair. The *Adkins* Court also acknowledged the trial court's discretion in ruling upon whether the probative value of the evidence was outweighed by the danger of undue prejudice, which is precisely what the trial court did in this case.

Second, the argument advanced here about "fraud on the jury" can be made any time evidence is excluded. For instance, evidence that a defendant might have liability insurance to indemnify the defendant against a loss in a case would not be admissible because it would be irrelevant to any issue in the case. Yet keeping that evidence from the jury permits the jury to speculate that the defendant will have to respond to any verdict by paying from personal assets. This is no less a "fraud" on a jury than exclusion of evidence designed to evoke an emotional reaction to a litigant (particularly where the trial court has determined that the evidence has questionable relevance to the real issue in the case, liability). Yet our rules and precedent are clear that a jury cannot know the truth that the defendant's liability insurer will respond to any judgment the jury returns because of the fear that the jury may award a verdict in light of the insulation the insurer provides. *Compare O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010) (rejecting argument by UIM carrier that permitting plaintiff to pursue punitive damages after signing covenant not to execute that insulates tortfeasor from harm perpetrates a fraud upon the jury).

Here, the trial court held that the jury would not be permitted to hear about an affair that occurred three years earlier, that had been confessed, and that had been

condoned and forgiven by Mrs. Fay, because this information had no bearing on liability (the real issue in the case) and further any probative value was greatly outweighed by the risk of confusion and undue prejudice. There is no "fraud on the jury," as was the concern in *Adkins*. It was not evidence of the current state of things between these parties, but evidence of something in their history that they had accepted and moved past.

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

> The breadth of matters relevant to the issue of damages in a wrongful death action suggests that evidence of an extramarital affair may be admissible to rebut or discredit a claim that the decedent's death deprived the surviving spouse of a faithful, loving companion. Indeed, a number of courts have so held. *See, e.g., Morales v. Superior Court*, 99 Cal. App.3d 283, 160 Cal. Rptr. 194, 197 (1979); *Countryman v. County of Winnebago*, 135 Ill. App.3d 384, 90 Ill. Dec. 344, 481 N.E.2d 1255, 1259-60 (1985); *Strelecki v. Firemans Ins. Co.*, 88 Wis.2d 464, 276 N.W.2d 794, 801 (1979). * * *
>
> That some aspects of a decedent's family relations may be relevant and admissible in a wrongful death action does not, however, mean that all aspects of family relations are relevant and admissible. There is a line to be drawn when the potentially inflammatory nature of the information exceeds its probative value. See V.R.E. 403; *Haynes v. Golub Corp.*, 166 Vt. 228, 236, 692 A.2d 377, 382 (1997). A trial court's duty is to balance these factors, to ensure that the primary purpose or effect of disputed evidence is to advance an issue in the case rather than "to appeal to a jury's sympathies, 'arous[e] its sense of horror, provok[e] its instinct to punish, or trigge[r] other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.'" *State v. Bruyette*, 158 Vt. 21, 31, 604 A.2d 1270, 1274 (1992) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* § 403[03], at 403-33-39 (1991)).
>
> The trial court is accorded wide latitude in making such evidentiary rulings, and we will not disturb its decision absent a showing of abuse of discretion. See *State v. Webster*, 165 Vt. 54, 56, 675 A.2d 1330, 1332 (1996).

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

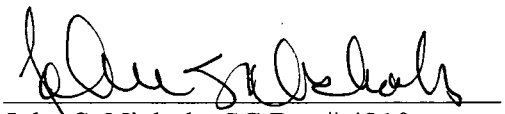
The decision whether to grant or deny a new trial also rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008). For the reasons stated, this Court should affirm the trial court's discretionary decision to deny GSRMC's motion for a new trial on the grounds that the trial court appropriately excluded the evidence of the affair under Rule 403, SCRE.[4]

[4] Mr. Fay would note that he presented evidence through Dr. Oliver Wood of economic losses totaling $1,771,982.00. (R. p. 562; p. 563, ll. 7-17; p. 564, ll. 1-4) The jury's verdict in this case was $3,000,000, and was reduced to reflect 4% fault on Plaintiff's part.

CONCLUSION

For the reasons stated the Court should affirm the trial court's rulings regarding GSRMC's motion for new trial arising out of the jury instructions and the evidentiary rulings in this case.

Respectfully submitted,



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May 24, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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

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

v.

Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center, Stephen W. Law, D.O.,
Dr. Richard Young, M.D., and Grand Strand Urology, LLP, ... Defendants,

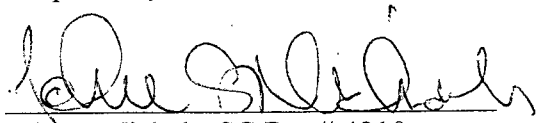
Of whom Grand Strand Regional Medical Center, LLC, d/b/a
South Strand Ambulatory Care Center is . . . . . Appellant/Respondent,

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Appellant's Brief, Reply Brief, Respondent's Brief to Appellant Stephen W. Law, D.O., and Respondent's Brief to Appellant Grand Strand Regional Medical Center, LLC* of Respondent/Appellant Fay comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



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May 28, 2013

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,

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Dr. Richard Young, M.D., and Grand Strand Urology, LLP, ... Defendants,

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

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

and

Of whom Richard Young, M.D., and
Grand Strand Urology, LLP are ..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of *Respondent/Appellant Sean D. Fay's final Appellant's Brief, Reply Brief, Respondent's Brief to Appellant Stephen W. Law, D.O., and Respondent's Brief to Appellant Grand Strand Regional Medical Center, LLC* by mailing copies of the same by United States Mail with first class postage prepaid to the following

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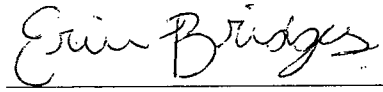

May 28, 2013

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