THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2017-CP-26-1571
Appellate Case No. 2019-001665

David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, ...Respondent,

v.

Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D. and Rachel Ash-Bernal, M.D.....Defendants,

Of which
Southern Myrtle Inpatient Services, LLC is.....Appellant.

INITIAL BRIEF OF RESPONDENT

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2. If Appellant's argument, that as matter of law a healthcare provider has no duty to ensure that its employees are properly trained, is determined to be preserved for review, can a duty exist for a healthcare provider to have duties to ensure that its employees are properly trained on certain matters related to their jobs?

3. If this Court finds that a healthcare provider does not have a duty to ensure that its employees are properly trained, did SMIS create a duty by having undertaken to train its employees on certain matters related to their jobs?

4. Viewing the evidence in the light most favorable to the Respondent, could the jury reasonably conclude that SMIS was negligent and thereby caused Matthew Scheer's death?

5. Did the trial court abuse its discretion by allowing evidence of SMIS's negligence with regard to the issue of training and, if so, was Respondent without notice of this issue such that the introduction of this evidence resulted in unfair prejudice?

6. If this Court determines there was error by the trial court such that a new trial should be granted, should the new trial be absolute, against all parties and as to all claims?

STATEMENT OF THE CASE

David Scheer, acting as the personal representative of Matthew Scheer's Estate, filed survival and wrongful death causes of action against Appellant Southern Myrtle Inpatient Services, LLC ("SMIS") on March 23, 2017. The claims brought against SMIS included not only claims of vicarious liability for the actions of two of the company's employees (sounding in medical negligence), but also included claims of direct corporate liability relating to the company's failure to properly educate and train its employees (sounding in ordinary negligence). Claims were also brought against Grand Strand Medical Center ("GSMC"), and against Drs. Patel and Dr. Ash-Bernal. Prior to trial, Respondent settled the claims brought against the hospital.

A five-day jury trial commenced on May 20, 2019. During the course of the trial, Respondent sought to demonstrate how SMIS did not ensure the proper training of its physicians. This negligence included issues relating to the privacy aspects of HIPAA and how the company's training focused only on restrictions and provided no information on permissible disclosures in circumstances related to patient safety. In short, Respondent presented evidence to show that SMIS had negligently trained its physicians and thereby created a misunderstanding as to how and when patient information can be shared for the patient's best interests. Evidence was also presented to show that SMIS's employees did not understand the protocols for instituting a temporary emergency hold on a patient with mental illness.

At the conclusion of the case, Appellant moved for a directed verdict and asserted: (1) the jury should not have been told that Matthew died by suicide; (2) Respondent could not be entitled to receive punitive damages; (3) the alleged negligence by Dr. Patel's could not causally be linked to Matthew's death; (4) there was insufficient evidence as to SMIS's duty to train and that Respondent had not offered expert testimony as to a breach of duty to that regard; and (5) Matthew's death was not foreseeable. (Tr. 400-426, ROA __). The trial court denied these motions.

The jury returned a verdict of $3,500,000.00 in actual damages against SMIS. The jury also found by clear and convincing evidence that SMIS's negligent conduct was wanton, willful, or reckless, and awarded $250.00 in punitive damages. In its post-trial motions, SMIS sought a judgment notwithstanding the verdict based on its prior directed verdict motions and argued that alleged evidentiary errors required a new trial. These motions were denied by the trial court. SMIS also moved to amend the judgment, asserting that the company could not be held liable since physicians not found to be liable. (*SMIS Post-Trial Motion, p. 4, ROA* __). In rejecting this argument, the trial court noted:

> Even though Plaintiff brought claims of corporate negligence that were separate and distinct from the allegations of medical negligence committed by Defendants Patel and Ash-Bernal, nonetheless, Defendant SMIS contends that it cannot be held liable if its agents were not found liable by the jury. This contention is mistaken and directly contrary to current South Carolina law. Critically, Defendant's position is only true when a plaintiff's claims are based solely on the doctrine of *respondeat superior*. In this case, Plaintiff asserted both vicarious liability claims and direct corporate liability claims against Defendant SMIS.

(*J. Hayes Order, p. 16, ROA* __).

After set-off from the prior settlement with GSMC, and after adding costs and interest accumulating from an offer of judgment Appellant had filed more than a year earlier, the judgment against Appellant came to a total of $3,308,801.36. This appeal followed.

INTRODUCTION AND BACKGROUND

I. Brief Factual Background

Appellant Southern Myrtle Inpatient Services, LLC ("SMIS") is a healthcare provider, organized and existing under the laws of South Carolina. (*Amended Complaint*, ¶ 3 and *SMIS's Answer*, ¶ 2, ROA at ___). SMIS contracted to provide hospitalist services at GRMC and, in order to do so, employed physicians that included Dr. Rachel Ash-Bernal. (*Amended Complaint*, ¶ 9 and *SMIS's Answer*, ¶ 2, ROA at __).

As required by federal law, SMIS provided training to its employees/physicians regarding the privacy provisions of Health Insurance Portability and Accountability Act ("HIPAA").[1] SMIS acknowledged that it provides HIPAA training to its employees. (Tr. 157-165, 378-386, ROA __). The adequacy of that training was central to the claims against SMIS.

While, generally speaking, privacy laws protect patient health information from disclosure to outside parties, HIPAA also contains specific provisions for information to be disclosed when doing so is in the patient's best interest and/or may lessen the threat of harm to a patient or the public.[2] As demonstrated at trial, the training that SMIS provided to its physicians was wholly devoid of any mention of these issues and focused solely on the how HIPAA keeps information private and made absolutely no mention of how the Act also provides for information to be disclosed for the purpose of patient safety and/or the safety of others. (Tr. 165, 192-93, ROA __). As a result of deficient training by her employer, one of SMIS's physicians, Dr. Ash-Bernal, was unfamiliar with the means by which a patient's family member could be contacted for health and safety (and the process for involuntary detainment), which resulted in the death of one of SMIS's patients.

II. SMIS's Treatment of Matthew Scheer

On the morning of October 2, 2015, David Sheer brought his a 26-year-old son, Matthew Scheer, to the emergency department of GSMC with grave concerns about a sudden change in Matthew's mental status that were evidenced by a departure from reality accompanied by wild delusions. The healthcare professionals in GSMC's emergency department found Matthew to have "*paranoia and hallucinations*" and determined that he was suffering from an acute onset

[1] Pub.L. 104–191, 110 Stat. 1936, enacted August 21, 1996, codified in 45 CFR Parts 160-64.
[2] *See* 45 CFR §§ 164.510 and 164.512, more specifically, 164.510(b)(3) and 164.512(j).

psychosis. Matthew was having auditory, visual, and tactile hallucinations and he was "*hearing voices and believ[ing] someone is plotting against him by poisoning him*" and had "*insomnia and anorexia due to believing that all 'food he used to eat is contaminated now.*'" Among other dangerous delusions, Matthew believed that he had been fighting demons in the woods. Matthew, who had long been diagnosed with epilepsy, was also found to have recently stopped taking his anti-seizure medication because he believed that he had been cured. **Although Matthew was not suicidal or homicidal, due to his psychosis and disconnection from reality, he was a danger to himself and could not be left alone.** (Tr. 329-341, ROA __, GSMC Recs, ROA at __).

Around noon that day, the attending emergency medicine physician directed David to take his son to the Lighthouse Center in Conway ("Lighthouse") for further evaluation and treatment. David brought Matthew to the facility as instructed. However, after reviewing Matthew's lab tests that had been done at GSMC and which demonstrated anorexia and dehydration (Matthew was not eating or drinking due to the poisoning delusion), Lighthouse's medical director determined that that Matthew was "not medically stable" and advised that Matthew should be taken back to a hospital.[3] (Pl's Trial Ex 1, Lighthouse Rec, ROA __; Pl's Trial Ex 3, Transfer Rec, ROA __). David and Matthew then returned to GSMC, where the emergency medicine physician arranged for Matthew's admission to the hospital. (Tr. 329-344, ROA __).

At around 4:00 PM on October 2, 2015, Matthew was admitted to GSMC with David being listed as his "*emergency contact*" and the "*person to notify.*" Matthew's hospital record also included his father's mobile telephone number. Although medical providers noted Matthew to be psychotic and delusional, at all times when he was with his father, Matthew was calm and

[3] Matthew also had an elevated white blood cell count, suggesting that he could be suffering from an infection.

cooperative. At or around the time of Matthew's admission to GSMC, one of SMIS's hospitalists, Dr. Nirlep Patel, was made Matthew's attending physician and a request for a consultation with a psychiatrist was placed. Although the note Dr. Patel entered into Matthew's chart reflected that he intended to order an anti-anxiety drug, this medication order was never actually placed. (GSMC Recs, ROA at ___, Tr. 479, ROA __).

Relieved that Matthew had been admitted to the hospital and believing him to be in a safe place, David left the hospital to retrieve some toiletries and clean clothes for his son. Before departing, David stopped by the nursing station and confirmed that the hospital's records had him listed as being his son's emergency contact and also had his mobile telephone number correctly recorded. (Tr. 242-350, ROA __).

At around 1:15 AM on October 3, 2015, Matthew approached the nursing staff and ripped off his hospital armbands. He was shirtless, "*pacing in the hallways*," acting erratically and exclaiming that the healthcare providers "*could not control him.*" The hospital's staff noted that Matthew was "*becoming aggressive*" with them and yelling that they were "*devil worshippers*" and that "*Obama is Satan.*" Another hospitalist employed by SMIS, Dr. Rachel Ash-Bernal, was paged/called and came to see Matthew. At this point, Matthew had neither been evaluated by a psychiatrist nor received any anti-anxiety or anti-psychotic medications. (GSMC Recs, ROA at __).

SMIS's hospitalist told Matthew that "*he could die from infection, seizures or as a result of his psychiatric illness.*" Although she believed Matthew to be in serious danger due to his psychosis and medical condition,[4] Dr. Ash-Bernal nonetheless allowed Matthew to walk out of the

[4] As mentioned previously, as a result of his delusion belief that all the food in the world was poisoned, Matthew had eaten and drank so little that he had become severely dehydrated and was anorexic. Further, although he had epilepsy (a disease for which this is presently no cure), as a

hospital's doors and into a major storm[5] and did so without contacting David about his son's departure. (GSMC Recs, ROA at ___). Crucially and tragically, the HIPAA training that SMIS had provided to its employees was absent of any materials or teaching regarding how information can be shared when doing so is in the patient's best interest or may lessen a threat of harm to the patient or the public. As a result of a training deficit about how disclosures of patient information are permissible when needed to protect patient safety, SMIS's physician did not contact David because she mistakenly believed privacy regulation would not permit her to do so. As a result of an additional training deficit regarding how only one physician's signature is needed to place an involuntary hold on a psychotic patient, Dr. Ash-Bernal did not seek to prevent Mathew's departure. As a result of these training deficits, Matthew Scheer, a young man suffering from psychosis, anorexia, dehydration, and untreated epilepsy, left the hospital alone, in the middle of the night, and during a violent storm. (Tr. 164-166, 192-194, ROA __, GSMC Rec, ROA __).

In the early morning hours of on October 3, 2015, approximately half an hour after Matthew's discharge, Duane Doherty, a witness standing on a balcony in a beachfront hotel approximately two miles away from GSMC, observed a young man fitting Matthew's description remove all of his clothes and run into the water screaming. Mr. Doherty observed the young man swim out into the ocean, where he was eventually knocked down by a large wave and never resurfaced. (Tr. 232-239, ROA __). David would later identify the clothes recovered on the beach as the clothing Matthew had been wearing when he had checked into GSMC. (Tr. 348-250, ROA

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result of his delusion belief that he had been cured, he was not taking his anti-seizure mediation and thus was at great risk of suffering a seizure.

[5] Evidence presented in the case demonstrated that at the time of Matthew's release from GSMC, Hurricane Joaquin was near the east coast and bringing torrential wind and rain. (Tr. 269, 297, ROA __).

__). Although the police searched for Matthew's body, it was never recovered. The South Carolina Probate Court later determined that Matthew Scheer drowned in the ocean on October 3, 2015.

STANDARD OF REVIEW

I. Directed Verdict Motions and Judgments Notwithstanding the Verdict

When reviewing the trial judge's decision on directed verdict motions or judgment notwithstanding the verdict, an appellate court must apply the same standard as applies to the lower court by viewing the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 435 S.E.2d 864 (1993); *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The appellant court may only reverse the denial of a motion for directed verdict or JNOV if no evidence supports the trial court's ruling. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999).

"The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). In deciding whether to grant or deny a directed verdict motion and JNOV, the trial court is concerned only with the existence or non-existence of evidence. *Long v. Norris & Assocs., Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). If there is more than one reasonable inference that can be drawn from the evidence, a directed verdict must be denied. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 508 S.E.2d 848 (1998). A directed verdict motion should be denied if, liberally construing the facts in the opposing party's favor, any evidence exists by which a verdict for the opposing party would be reasonably possible. *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts

in the testimony or evidence. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

A directed verdict is appropriate only in rare circumstances. See *Linnen v. Commercial Cas. Co.*, 152 S.C. 450, 150 S.E. 127, 128 (1929) (stating that it is only "rare cases in which a directed verdict is proper"). In denying a motion for a directed verdict, the trial court can only be reversed by the appellate court when there is not a scintilla evidence to support the nonmoving party's case. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999).

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

II. Questions of Duty

The existence of a duty in tort, and accordingly whether there is absence of a duty, is a question of law for the courts. *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011), citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (recognizing that whether a duty exists is a question of law for the courts). Matters of law are reviewed *de novo*. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

III. Admission of Evidence

The admission of evidence is a matter left to the discretion of the trial judge. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991). Therefore, on appeal, an appellate court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. *R&G Constr., Inc.*

v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000); *American Federal Bank v. No. 1 Main Joint Venture*, 321 S.C. 169, 467 S.E.2d 439 (1996) (admission and rejection of testimony is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal unless the appellant can show abuse of such discretion, commission of legal error in its exercise, and resulting prejudice to appellant's rights). The trial judge's decision regarding the admission of evidence will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001); "For this Court to reverse a case based on the admission of evidence, **both error and prejudice must be shown.**" *Seabrook Island Prop. Owners' Ass'n.*, 365 S.C. 234 at 242, 616 S.E.2d 431 at 435 (Ct. App. 2005) (emphasis added). To show prejudice regarding evidence, an appellant must prove that there is a "reasonable probability the jury's verdict was influenced by the challenged evidence." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

ARGUMENT

I. Claims of Corporate Negligence (General Negligence)

A. Because negligent corporate acts (and inactions) were shown, the jury finding liability against SMIS, while not specifically finding against its employees, is not an irreconcilable verdict as explicitly held in *Morrow. v. Fundamental Long-Term Care Holdings, LLC.*

The crux of many of SMIS's arguments center around a legally incorrect position that the company cannot be held liable for its own corporate bad acts if its agents are not also found liable of medical negligence. This contention is mistaken and directly contrary to South Carolina law. SMIS's position would only be applicable to situations where a plaintiff's claims are based solely on the doctrine of *respondeat superior*. However, in this case at bar, Respondent asserted both vicarious liability claims and direct corporate liability claims against SMIS, and the jury

appropriately found in favor of Respondent on the claims of direct corporate liability relating to a failure to properly train.

As specifically confirmed in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015), vicarious and direct corporate claims involving medical negligence are not dependent upon one another, nor are they predicated upon a finding of negligence against the employee:

> The [plaintiffs] correctly assert that the theory of vicarious liability is different than the theory of direct corporate liability. Vicarious liability attaches to a parent company or employer as the result of negligence on behalf of its employees, such as through the doctrine of *respondeat superior*. Conversely, **direct corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient**, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or **undertrained so as to provide substandard care.** Accordingly, **the two theories of vicarious liability and corporate liability can coexist in a lawsuit, and a finding of one does not necessarily preclude a finding of the other.**

Id. (internal citations omitted) (emphasis added). In *Morrow*, the Supreme Court rejected the corporate medical provider's argument that any verdict against entity must first be predicated on a finding of an actionable tort by an employee, and noted that if a healthcare provider undertrains or improperly trains an employee, and as a result the employee provides substandard care, liability can lie with healthcare provider for its training failures/deficits.

In addition to medical negligence, direct corporate liability for the failure to train and to educate employees has been confirmed in other fields as well. See *James v. Kelly Trucking Co.*, 377 S.C. 628, 661 S.E.2d 329 (2008) (training of trucking company employees). In *James*, the South Carolina Supreme Court stated that "the employer's liability under such a theory does not rest on the negligence of another, but on the employer's own negligence. Stated differently, the

employer's liability under this theory is not derivative, it is direct." *Id.* at 631 (emphasis added). In the case at bar, the jury was properly charged on issues of direct corporate liability:

> Plaintiff has alleged and Defendant Southern has denied that it, Southern Myrtle, failed to provide education and training to Dr. Ash-Bernal and Dr. Patel relating to the applicable standard to detain a mentally ill patient and permission -- permissive disclosure of health information. You may consider these alleged actions or failures of the corporation Defendant along with the other allegations.

(Tr. 770, ROA __).

If an employer's improper or undertraining of an employee results in negligence (ie. "substandard care") being committed by the employee, liability does not necessarily rest with the employee but may be attributed employer for having improperly or undertrained its employee. *Morrow* at 538, 773 S.E.2d at 146. In the case at bar, the jury was free to conclude that Dr. Ash-Bernal exercised "her best judgment" in dealing with Matthew Scheer, but that her judgment was handicapped due to SMIS's failures to train relating to permissible disclosures for the patient's best interest and for public safety and on what it means to be unable to consent. "[I]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003); *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 562-63, 619 S.E.2d 5, 10 (Ct. App. 2005). Viewing the evidence in the light most favorable to the Respondent, logic can be found for the jury's decision and there was nothing improper or irreconcilable about the jury's verdict and, accordingly, the verdict must stand.

B. <u>Appellant's argument that, no duty to train exists as a matter of law, was not presented to the trial court and is not preserved for appellant review.</u>

In its appeal, SMIS contends that, as a matter of law, it did not owe a duty to Matthew Scheer (or presumably to any of its other patients) to ensure that its employees received appropriate training and that the training it provided to its employees was not presented in a negligent manner.

As detailed below, this argument fails for a number of reasons. However, this is a new argument that was never made to the trial court, and thus the appellant court need not consider this issue because it is not preserved for review.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). The requirements for error preservation are designed "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'on v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Staubes*, supra. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Appellant's initial and seemingly primary argument in this appeal is that a healthcare provider has absolutely no obligation to ensure that its physicians are properly trained, and specifically argues: "*SMIS did not and could not have the alleged duty to train.*" (Initial Brief at 14). Shockingly, this healthcare provider even claims that "SMIS did not owe a duty to the Patient." (Initial Brief at 15). While these assertions are wholly inaccurate, they need not be addressed for they were neither argued during the trial nor presented to the trial court in SMIS's 19-page post-trial motions. (Trial Transcript, SMIS Post-Trial Motions, ROA __). While Appellant's post-trial motions did claim that Respondent "provided no evidence to the court to establish a legal duty of a corporate entity to provide training to its physicians on HIPAA's permissive exceptions," this is an assertion about the sufficiency of evidence and is fundamentally

different than this new, legal argument that, as a matter of law, no duty can exist. This issue – whether there existed a legal duty for SMIS to ensure that its employees are properly trained as to permissible disclosures – was never presented to the trial court and thus is not ripe to be considered in this appeal.

C. SMIS (and other healthcare providers) had a duty to ensure that the company had properly trained employees, and nothing about this duty requires the company to make medical judgments or practice medicine.

Even if this Court finds that the legal requirement for training is an issue preserved for review, such a duty existed under the law. A duty "may be created by statute, contract relationship, status, property interest, or some other special circumstance" *Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (S.C. 1997). As stated by the South Carolina Court of Appeals:

> There is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection. Suffice it to say that a multiplicity of factors comes into play when courts contemplate the question of duty. These factors include the policy of deterring future tortfeasors, the moral culpability of the tortfeasor and numerous other conceivable factors; duty is seen in general terms as requiring a person or corporation to conform his or its conduct to a standard which is adequate to protect others from unreasonable risk of harm.

Araujo v. Southern Bell Tel. & Tel. Co., 291 S.C. 54, 57-58, 351 S.E.2d 908, 910, (Ct. App. 1986). Duties may arise in tort from applicable statutory or regulatory provisions, deviations from industry standards, or from common law duties to exercise care. See *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004); *Tommy L. Griffin Plumbing v. Jordan, Jordan, & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995); *Kennedy v. Columbia Lumbar Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989). Duty extends to foreseeable victims of the risks involved. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980).

South Carolina law is clear that corporate medical providers owe a legal duty to patients under their care. See *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 533 S.E.2d 312 (2000); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). It is without debate that SMIS is a healthcare provider,[6] and while the company, itself, may not practice medicine, SMIS exists to provide appropriate medical services to the company's patients and does so through its employees. A healthcare provider has a duty to ensure that its employees are properly trained. *Morrow*, supra. Furthermore, training on regulatory issues and procedures is not the practice of medicine.[7]

Appellant advances a tortured construction of South Carolina law regarding the regulation of physicians that was generally designed to ensure the safety of the public – to somehow conclude that corporate medical providers owe no duty to their patients. This attempt of legal contortion must fail.

A healthcare provider, whether a hospital, dermatology practice, or hospitalists group such as SMIS, is required to ensure that its employees receive training about HIPAA. Federal law provides that SMIS "**must train all members of its workforce on the policies and procedures with respect to protected health information [....] as necessary and appropriate for the members of the workforce to carry out their functions within the covered entity.**"[8] 45 CFR 164.530(b) (emphasis added). In short, not only does SMIS role as a healthcare provider create a

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[6] In paragraph 3 of its Amended Complaint, Respondent alleged that SMIS "**is a healthcare provider.**" (Amended Complaint, ¶ 3, ROA __). In its Answer, SMIS responded by admitting this allegation. (Answer, ¶ 2, ROA at __).

[7] Hospitals and physician practice groups routine present training on regulatory issues to their employees and in Dr. Patel even testified that he has received HIPAA training from hospitals and employers (Pl's Memo Opposing Post-Trial Motions, Ex. 4, Depo of Dr. Patel (p.67:17-24, ROA __).

[8] As a healthcare provider, SMIS is a "covered entity" under HIPAA. See 45 CFR 160.103.

duty but federal law specifically requires that it "must" provide training to its employees on HIPAA.

D. Even if no duty initially existed, SMIS created a duty to provide training in a non-negligent manner by undertaking to provide training to its employees.

Even if were to be determined that SMIS did not initially have a duty to train its employees on the use of health information, the company undertook to train its employees and thus created the duty to provide the training in a non-negligent manner. See *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 826 S.E.2d 285, 290 (2019) (providing that even when there is generally no duty to act, a duty to use due care arises where an act is voluntarily undertaken); *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991) ("If an act is voluntarily undertaken, however, the actor assumes the duty to use due care."). Thus, once SMIS undertook to train its physicians, it had an obligation to do so properly.

E. Evidence was presented by which the jury could find negligent and/or inadequate training.

At trial, case, Respondent published testimony, obtained in a deposition of SMIS taken pursuant to Rule 30(b)(6), SCRCP, on the training SMIS provided and failed to provide to its employees. This testimony demonstrated that:

- SMIS has not promulgated any policies or procedures that would guide or otherwise be applicable to its employees;
- SMIS expects its physicians to be knowledgeable on privacy policies of the hospital in which he/she is working;
- SMIS has taken no action or effort to ensure that its doctors are knowledgeable on hospital policies and procedures;
- SMIS has taken no actions to educate or train its physicians about their power to temporarily detain a patient to prevent injury to themselves or others;
- SMIS has no knowledge about the permissible disclosures of patient information under HIPAA;
- SMIS has never sought to educate the physicians it employs on HIPAA's

permissible disclosures;

- SMIS provides some training to its employees;
- SMIS provides training from an overarching corporate standpoint, but relies solely upon clinicians and hospitals for specific training;
- SMIS has not instituted any mechanisms to confirm its employee's attendance at training seminars;
- SMIS is unsure if it ever provided any training to Dr. Ash-Bernal;
- SMIS has online corporate training on HIPAA, but has never looked into whether Dr. Ash-Bernal attended that training;
- SMIS cannot speak as to whether Dr. Ash-Bernal has received training on the "dos and don'ts" of HIPAA.

(Tr; 378-386, ROA __).

Some of this testimony could be viewed as contradictory (for example, how can the company provide its physicians HIPAA training if the company has no knowledge about the permissible disclosures of patient information under HIPAA), and it was within the province of the jury to believe or disbelieve whatever portions of this testimony that it deemed appropriate. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997) (noting that "the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve"). Notable, when asked as to what if any efforts SMIS took to research the topic of the physician's ability to temporarily detain a patient against his will (a specific topic identified in the notice of the 30(b)(6) deposition), SMIS responded: "We do not take that stance. Southern Myrtle does not take that stance." This would seem to imply that the company's physicians are not empowered to temporarily detain a patient. (Tr. 378, ROA __).

The inconsistent nature of SMIS's position, the lack of knowledge by its designated corporate representative, coupled with the evasive nature of some of the testimony, could reasonably have led the jury to conclude that SMIS was not being forthright and to further conclude

that the company had not undertaken reasonable effort to ensure that its physicians were properly trained.[9]

During the video deposition that was played to the jury and during her live testimony at trial, Dr. Ash-Bernal appeared to be unaware of her employer's name. (Tr. 221, playing video depo of Ash-Bernal, p.10, ROA __, Tr. 506, 556, ROA __). This could be seen as demonstrating that SMIS had a miniscule degree of involvement with its employees, and furthered the jury's conclusion that the company had been negligent in ensuring that its employees received appropriate training. Dr. Ash-Bernal also demonstrated a gross misunderstanding of permissible disclosures in situations where disclosure would be in the patient's best interest.[10] Further, Dr. Ash-Bernal demonstrated a lack of understanding for the process involved in temporarily detaining a patient.[11] From this testimony, the jury was free to conclude that SMIS had failed to ensure that its employee was knowledge about some of the procedures and processes related to her job at the hospital.

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[9] By way of example, SMIS testified that it did not have any mechanism to confirm its employee's attendance at training seminars. Besides the fact that the jury could have determined that the company acted negligently by not having a mechanism to track this important information. The jury could also have determined that this testimony was untrue, and given the evasive and contradictory answers, coupled with Dr. Ash-Bernal's lack of knowledge on the topic, reached the conclusion that SMIS actually tracked its employee's attendance at training seminars and was aware that Dr. Ash-Bernal never attended and, acting negligently, did nothing about this.

[10] Dr. Ash-Bernal testified that even in situations where a patient has a psychiatric illness, she nonetheless has to respect the patient's wishes and cannot contact family members even if doing so would be in the patient's best interests. (Tr. 221:15-16, playing video depo of Ash-Bernal, p.23, ROA __). 45 CFR 164.510(b)(3) demonstrates that she is incorrect and undertrained on this issue.

[11] Dr. Ash-Bernal testified that even when a patient is in imminent danger, two physicians must sign in order to place a temporary involuntary hold. (Tr. 221:15-16, playing video depo of Ash-Bernal, p.23, ROA __). However, as was demonstrated to the jury, pursuant to GSMC's own "Application for Involuntary Emergency Hospitalization for Mental Illness" form (Pl's Trial Ex. 8, ROA __), as well as S.C. Code § 44-17-410(2), only one signature is needed.

While some of the evidence against SMIS was in some ways circumstantial, such evidence is every bit as competent and capable of proving the relevant facts at issue as direct evidence. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (noting that our law makes no distinction between the efficacy and weight to be given to either circumstantial evidence and direct evidence). "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 59–60, 159 S.E.2d 921, 923 (1968). "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." *State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) (citing *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955). Circumstantial evidence can serve to establish "collateral facts from which the main fact may be inferred, and is typically characterized by inference or presumption." *State v. Salisbury*, 343 S.C. 520, 524, n.1, 541 S.E.2d 247, 248 (2001) (emphasis added). Evidence is said to be indirect or circumstantial when the proof of some other fact or facts from which, taken either singularly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence. 30 S.C. Jur. Evidence § 43 (citing *United Textile Workers of America, AFL-CIO, Local Union No. 120 v. Newberry Mills, Inc.*, 238 F. Supp. 366 (W.D.S.C. 1965). Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such a fact does exist. *Id.* Rarely are cases built entirely on direct evidence and direct evidence is not required.

> The law does not require every fact and circumstance of negligence to be proved by direct and positive evidence or the testimony of eye witnesses. **Proof of negligence may rest entirely on circumstances,** and circumstantial evidence alone may authorize a finding of negligence. **Negligence may be inferred from all of the facts and attendant circumstances in the case, and where the circumstances are such as to**

> **take the case out of the realm of conjecture and into the realm of legitimate inferences from established facts**, a *prima facie* case is made.

Childers v. Gas Lines, Inc., 248 S.C. 316, 322, 149 S.E.2d 761, 764 (1966) (emphasis added) (citation omitted).

Thus, while some of the evidence of SMIS's negligence may have been circumstantial, it was, nonetheless evidence through which, viewed in the light most favorable to the Respondent, the jury could have rendered a verdict against SMIS.

F. <u>Although expert testimony was presented, expert testimony was not required in order to prove ordinary negligence by the corporation.</u>

Defendant SMIS incorrectly seeks to characterize all of the claims made against the corporation as medical malpractice claims requiring expert testimony. Such a mischaracterization ignores the fact that the trial court charged the jury on both medical malpractice claims against the physicians and on ordinary negligence claims against the remaining corporate defendant. While standard of care testimony is often needed to make claims of medical malpractice,[12] our courts are clear that ordinary negligence claims do not carry the same requirement.

Negligence relating to a failure to properly train employees sounds in "ordinary negligence" and does not trigger a claim of medical malpractice with the need for expert testimony.

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[12] It should be noted that S.C. Code Ann. § 15-36-100(C)(2) provides that expert testimony is not needed to establish medical negligence when the claims pertain to "negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." The principle is firmly established by our case law. *See eg., Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978) (holding that a tubal ligation procedure that rendered intrauterine device and other birth control devices useless constituted a matter of common knowledge); *Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (recognizing expert testimony was not required for a claim arising from a surgical drill that burned skin on contact because issues would fall within the common knowledge or experience of laymen); *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (where a patient testified that an unsupervised dental assistant rammed a sharp object into her mouth, even without the support of expert testimony, the evidence presented was sufficient for the jury to infer a breach of duty to the patient).

Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014); see also *Morrow*, supra at 538, 773 S.E.2d at 146 (holding that direct corporate liability attaches due to a breach of a duty that runs directly between a parent company and the company's patients and arises from negligence in actions such as leaving a hospital "undertrained so as to provide substandard care"). The *Dawkins* court specifically noted:

> The statutory definition of medical malpractice found in S.C. Code § 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, **administrative, ministerial**, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence.

Id. at 177-78, 758 S.E.2d at 504-05 (emphasis added). In the present case, SMIS's negligence involves a failure to properly train its staff on permissible disclosures, which is not a medical action (and certainly not medical decision making) but is one that is administrative and/or ministerial in its nature.

Further, the existence of such a duty is not established by expert testimony but is determined by the trial court. In ordinary negligence actions, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty." See *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135-36, 638 S.E.2d 650, 656 (2006) (holding that a facility has duty to supervise and care for a patient with special needs admitted to facility); *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (holding that a laboratory hired by a factory to test the factory's workers for drug use owed a duty to the workers in the administration of the tests and the supervision of its employees performing the tests).

In denying the motion for a directed verdict, the trial court properly reasoned that SMIS had (or through its own voluntary actions created) a duty to train its physicians on permissible disclosures of patient information. Because the substance of such training involves things that are

not medical in their nature but relate to compliance issues common to all healthcare industry workers (including receptionists and clerical staff), it is particularly appropriate to conclude that a duty existed for SMIS to provide its staff with complete and accurate training on HIPAA's permissible disclosures. Accordingly, Appellant's argument that expert standard of care testimony was necessary in order to establish a duty owed by a corporate defendant must fail.

In sum, as determined by the trial court and as charged to the jury on Respondent's ordinary negligence claim, SMIS had a duty to ensure its physicians and all staff were adequately and appropriately trained. This does not mean that SMIS has to direct its physicians as to how they should practice medicine or otherwise interject into their decision making, but the healthcare providers did have an duty to ensure that its physicians receive proper training, including training on permissible disclosures of information and the mechanism/process for involuntary detainment.

Moreover, if the Court determines that expert testimony was required to establish the duty and breach of duty, there was ample expert testimony to support the verdict. At trial, Respondent submitted the testimony of Robert Robinson, M.D., who was duly qualified as an expert in hospital medicine (the same very type of medical services that SMIS provides at GSMC) and who specifically testified that SMIS, as a medical provider, had a responsibility to ensure its employed physicians were trained and knowledgeable on the legal standards for permissible disclosures of information under HIPAA. (Tr. 116-118, 157-165, 192-194, ROA __). Dr. Robinson testified to this precise issue during his cross-examination:

> Q: And I just wanted to be clear that as a physician, as a hospitalist, a nocturnist or somebody working at CVS, you don't only get your education from your employer; correct?
>
> A: No. We don't solely get our education from our employer as it relates to our medical care or any knowledge for that matter, **but it is the responsibility of the employer to ensure that we do receive adequate education in the**

HIPPA law and that they provide that and follow up and ensure that we have completed said education in HIPPA [....]

Q: The—it's not a singular source. It comes from lots of different types and sources whether its employers or hospitals you work at, continuing medical education classes, you're always absorbing it from lots of different sources; fair?

A: Yes, that's fair, but again, I'll go back to my statement that **it's still the responsibility of the employer to make sure that the physicians employed have an understanding of the concepts of HIPPA that would affect them in their day-to-day practice.**

(Tr. 193-195, ROA __; emphasis added).[13]

Dr. Robinson further testified that the SMIS training materials that he had reviewed (sought during discovery and produced by SMIS less than two weeks before trial)[14] were materially deficient in that they focused solely on prohibited disclosures under HIPAA and failed to provide any information on the permissible disclosures to lessen the potential for harm to a patient. He stated that while SMIS's training materials do "speak to the conditions or circumstances where a provider cannot communicate information about a patient's health to anyone, [they do] not include the very important side of that coin as to when a prescriber or provider can share health information with a family member or, or other individual." (Tr. 157-165, ROA __). In other words, the training SMIS provided mislead its employees that there are no occasions where the disclosure of patient information is permitted. This concept is within the purview of a layperson, that is to say, a layperson can understand that it is dangerous to scare physicians about privacy provisions and not empower them with the knowledge about permissible disclosures that can reduce the risk of harm

[13] Dr. Robinson's testimony is consistent with 45 CFR 164.530(b) (discussed above) that (along with other federal provisions) require a healthcare provider to ensure that the members of its workforce is knowledgeable regarding permissible disclosure and non-disclosure of health information.

[14] See Tr. 597, ROA __.

to a patient (and the public). It is within a layperson's understating to recognize that training employees solely about how disclosures that are not permitted, while not also addressing circumstances under which disclosure are allowed, has the potential to misinform and effectively render employees afraid to ever disclose information, even when doing so is needed for safety purposes. Further, based on his review of Dr. Ash-Bernal's testimony, Dr. Robinson was highly critical of her lack of knowledge regarding permissible disclosures when needed for patient safety. (Tr. 157, ROA __).

In addition to Dr. Robinson's expert testimony regarding the obligation of a corporate medical provider to properly train its staff on permissible disclosures, the jury was also provided information and testimony relating to GSMC's policies and procedures, including its "Notice of Privacy Practices" that was admitted into evidence. (Pl's Trial Ex. 5, ROA __). Notably, while Defendant SMIS expects its physicians to comply with the hospital's privacy policies, there was ample evidence submitted that Dr. Ash-Bernal had not been trained or made familiar with the hospital's "Notice of Privacy Practices" that specifically states that disclosure can be made to a "person or persons able to prevent or lessen a serious threat to health or safety." (Pl's Trial Ex. 5, ROA __). Further, the 30(b)(6) testimony established that although SMIS's expects its physicians to be familiar with GSMC's policies, the company it took no action to train or otherwise ensure that its physicians received training on those policies. Given Dr. Ash-Bernal's lack of familiarity with those policies, the jury could reasonably conclude that her employer had failed to properly train her on HIPAA and/or the related hospital privacy policy.

The jury was given extensive information on permissible disclosures via: (1) expert testimony; (2) GSMC's Notice of Privacy Practices: (3) the hospital's policy on consent; (4) the involuntary admission form; (5) and materials from the U.S. Department of Health and Human

Services (discussed in more detail later in this brief). Armed with this information, the jury was tasked with evaluating SMIS's testimony and Dr. Ash-Bernal's knowledge on these protocols, which demonstrated a lack of understanding on a number of topics. Particularly when viewing the evidence in the light most favorable to the Respondent, the jury was free to conclude that SMIS was negligent for having left a part of its workforce (Dr. Ash-Bernal) undertrained.

G. Evidence was presented by which the jury could link the negligent training to Matthew's death.

Appellant argues there was no evidence to support the jury finding that SMIS's failure to properly educate and train its physicians caused injury to Matthew Scheer. As the trial court correctly determined, there was ample testimony submitted to support a finding of proximate cause. As discussed in greater detail below, there was evidence that SMIS's failure to properly train and educate its physicians resulted in the failure of one its employees to call Matthew's father (or to detain him) and that Matthew's death would not have occurred if such a telephone call (or temporary detainment) had taken place.

"Proximate cause requires proof of (1) causation in fact and (2) legal cause." *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is proven by showing that the injury would not have occurred "but for" the defendant's negligence. *Hanselmann v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980). Legal cause is proven by establishing foreseeability. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978).

A negligent act or omission is a proximate cause of injury if without it, in a natural and continuous sequence of events, the injury would not have occurred. *Vinson v. Hartley*, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). Foreseeability is determined by looking to the natural and probable consequences of the act or inaction at issue. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). A plaintiff therefore proves causation in fact by

establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. *Bramlette*, supra. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, a plaintiff need not prove that the person or company charged with negligence should have contemplated the particular event which occurred. *Id.* It is sufficient that the defendant should have foreseen that its negligence had the likelihood of causing injury to someone. *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990).[15] Proximate cause is the efficient or direct cause of an injury. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997); *Vinson*, 324 S.C. at 401, 477 S.E.2d at 721. Proximate cause does not mean the sole cause. *Small*, 329 S.C. at 464, 494 S.E.2d at 843. A defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. *Id.*

The issue of proximate cause may be resolved by either direct or circumstantial evidence. *Hurd v. Williamsburg Cty.*, 353 S.C. 596, 613, 579 S.E.2d 136, 145 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). Only in very rare or exceptional cases may the question of proximate cause be decided as a matter of law. *Hurd* at 613–14, 579 S.E.2d at 145.

As to legal cause and foreseeability, an argument that the Respondent failed to demonstrate legal cause was never presented to the trial court in the directed verdict motion and is not preserved

[15] Cf. Appellant's Brief at page 25 (arguing SMIS's must have specifically contemplated five independent acts in order to establish causation). Appellant conveniently frames the foreseeability issue in an outrageously narrow manner.

for review.[16] Nonetheless, the foreseeably that injury can result if a physician is improperly or inadequately trained and does not understand that patient information can be disclosed for safety purposes is axiomatic. It was reasonably foreseeable that if SMIS's physicians did not know that disclosure of patient information is permissible when doing so is in the patient's best interest or for the purpose of patient safety, that such a knowledge deficit has the potential to cause harm.

As to causation in fact, Appellant argues that Respondent (and presumably the jury) have somehow attempted to improperly separate the "medical decision making" of SMIS's employee from a causal link. SMIS's position is unfounded and ignores that the allegations in this case do not hinge on a "medical decision" as to whether Matthew was mentally competent and that the claims also involve whether or not SMIS's physicians had been properly trained on permissive disclosures that are in a patient's best interest. Dr. Ash-Bernal's testimony demonstrated a dangerous knowledge deficit about permissible disclosures, testifying that even when a patient has psychiatric illness and disclosure is needed for patient safety, she nonetheless has to "respect" the patient's wishes and not disclose information to a family member. (Tr. 221, playing video depo of Ash-Bernal, p.61-64, ROA __).[17]

Viewing the evidence in the light most favorable to the Respondent, there was sufficient evidence to conclude that had SMIS properly trained Dr. Ash-Bernal about permissible disclosures of patient information, she would have understood that she could contact David Scheer and would have done so and thereby preventing Matthew's departure from the hospital (or at least his unescorted departure) and prevented his death. The jury could reasonably conclude that had David

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[16] Appellant's directed verdict motion dealing with causation was only addressed to causation relating to Dr. Patel's actions and inactions.

[17] It is notable that Dr. Ash-Bernal's testimony at trial was disparate. Respondent played video testimony from her deposition which was fundamentally different than her direct exam. The jury was free to conclude which version of Dr. Ash-Bernal's testimony was true.

Scheer been called about the change in his son's behavior and condition, he would have come to help his son, just as he had done during the previous day, and David testified that he expected to receive a call if there was a change in Matthew's condition. (Tr. 347, ROA __). The evidence also demonstrated that when Matthew was with his father, he was calm and cooperative, and thus it is reasonable to conclude that David would have been able to prevent Matthew's delusional swim into the turbulent ocean. (Tr. 336, 344, 360, 444, ROA __). Further, Dr. Malone (Plaintiff's expert in psychiatry) testified that when psychiatric patients receive proper treatment and care, they typically responded positively and go on to lead normal, healthy lives. (Tr. 276, ROA __). In sum, construing all evidence and inferences in Respondent's favor, there was ample evidence for the jury to conclude that SMIS's failure to train its physicians was a contributing/proximate cause of Matthew's death.

II. SMIS has a misunderstanding regarding permissible disclosures of information and what it means to be "unable to consent."

SMIS's misunderstanding as to permissible disclosures of patient information and the meaning of " unable to consent" continues, for just as the company improperly educated its employees, its brief also demonstrates confusion. Notably, the diagram that SMIS presents on page 19 of its initial brief is simply incorrect. The diagram (and the briefing around it) state that a determination of incapacity is needed before healthcare information can ever be disclosed. As discussed below, in emergency circumstances and as needed for patient safety, a determination of incapacity is not a prerequisite for disclosure. Furthermore, "incapacity" is not synonymous with "inability to consent" which can simply mean "unable to appreciate the nature and implications of the patient's condition," and many people are unable to appreciate the nature and implications of their condition but are not incapacitated. S.C. Code Ann. § 44-66-20(8). Even though federal

provisions and the hospital's policies, promulgated thereunder, expressly permitted the disclosure of information in this circumstance, SMIS fundamentally misunderstands these key concepts.

Additionally, it should not go without correction that SMIS's statement that the "process for deeming a patient incapable of consent requires certification by two physicians" finding the patient "cannot make a 'reasoned decision' about his healthcare," is also misleading. (*Initial Brief, p 15*). When a person is in eminent danger, "the patient's inability to consent may be certified by a [single] health care professional responsible for the care of the patient if the health care professional states in writing in the patient's record that the delay occasioned by obtaining certification from two licensed physicians would be detrimental to the patient's health." S.C. Code Ann. § 44-17-410(2). This process is demonstrated by the GSMC's "Application for Involuntary Emergency Admission" form, another key process with which Dr. Ash-Bernal was familiar. (Pl's Trial Ex. 9, ROA __). Further confusing these issue, Appellant's brief omits important parts of the definition of "unable to consent," which is defined as follows:

- unable to appreciate the nature and implications of the patient's condition and proposed health care,
- to make a reasoned decision concerning the proposed health care, **or**
- to communicate that decision in an unambiguous manner.

S.C. Code Ann. §§ 44-66-20(8) and 44-17-410(2) (addressing temporary involuntary holds). In other words, a determination of "incapacity" is not needed to place a hold (let alone disclose information a patient's emergency contact), and if Matthew was unable to appreciate the nature and implications of his condition and proposed health care, then he was unable to consent to signing the against medical advice form which led to his discharge.

Although Dr. Ash-Bernal may have testified that she believed Matthew to have the requisite mental capacity to consent, the jury was free to disbelieve all or part of her testimony. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997)

("[I]t is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve."); *Keene v. CAN Holdings, LLC,* 426 S.C. 357, 374 (Ct. App. 2019) (noting that simply asserting something does not necessarily make it so). Other witness testimony demonstrated that Dr. Ash-Bernal spent very little time evaluating Matthew. (Tr. 224, playing the video deposition of Greg Phaebus, ROA ___). The jury was free to conclude that she did not spend much time evaluating Matthew because, once he asked to leave, she was not trained to realize that there were options available to her to protect Matthew's safety.

Because Matthew was not eating due to a delusion that all the food in the world had been poised, believed those around him to be devil worshippers, and was not taking his anti-seizure medication because he thought his incurable seizure disorder had been cured, one need not view the evidence in the light most favorable to the Respondent to recognize that the jury could have reasonably determined that Dr. Ash-Bernal's failure to place a temporary involuntary hold on Matthew was not actually related to her medical judgement but resulted from inadequate training about these critical protocols. Based on the evidence presented, the jury could reasonably reach the conclusion that as a result of negligent training by SMIS, Dr. Ash-Bernal misunderstood what it means for a patient to be "unable to consent" and what information she could disclose. She also demonstrated being undertrained in the process of an emergency involuntary hold, as she believed that two signatures were required. (Tr. 221, playing video depo of Ash-Bernal, p.23, ROA __). Thus, the jury could have attributed Matthew's release to SMIS's negligence in improperly training or undertraining of its employees on these non-medical protocols.

Furthermore, had SMIS properly trained its physician, Dr. Ash-Bernal would have been aware that disclosure of healthcare information does not always require the patient's inability to

consent. See 45 CFR § 164.512(j) and 45 CFR § 164.510(b).[18] This very issue is specifically acknowledged in GSMC's Notices of Privacy Practices. (Pl's Trial Ex. 5, ROA __). In a letter addressed to "Our Nation's Health Care Provides," which was entered into evidence, the U.S. Department of Health and Human Services stated:

> **[The HIPAA] Privacy Rule does not prevent your ability to disclose necessary information about a patient to law enforcement, family members of the patient, or other persons, when you believe the patient presents a serious danger to himself or other people.**
>
> **The HIPAA Privacy Rule protects the privacy of patients' health information but is balanced to ensure that appropriate uses and disclosures of the information still may be made when necessary to treat a patient, to protect the nation's public health, and for other critical purposes, such as when a provider seeks to warn or report that persons may be at risk of harm because of a patient.** When a health care provider believes in good faith that such a warning is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others, the Privacy Rule allows the provider, consistent with applicable law and standards of ethical conduct, to alert those persons whom the provider believes are reasonably able to prevent or lessen the threat.

(Pl's Trial Ex. 9, ROA __ (emphasis added)). When health and safety so require, disclosing patient information does not necessarily require that the patient be unable to consent.

Had SMIS properly trained Dr. Ash-Bernal about permissible disclosures, she would have understood that disclosure is permitted not only when a person is unable to consent but is also allowed in an emergency circumstance. Thus, even if Matthew's psychiatric condition was not to such a degree that he lacked the ability to give consent, his psychiatric outburst and desire to leave

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[18] In an emergency circumstance, 45 CFR § 164.510(b) allows for disclosure of information that is consistent with the patient's prior expressed preferences and is "in the individual's best interest." Although Appellant has implied that Matthew did not want Dr. Ash-Bernal to call his father (Initial Brief, p. 10), in actually, what the medical record reflect is that Matthew, himself, did not want to talk to his father. (GSMC Rec, ROA __; Tr. 149-150, ROA __). This is an important distinction, for David Sheer was Matthew's emergency contact and there is no evidence that Matthew ever revoked this designation or that he told Dr. Ash-Bernal that he did not want her to speak with his father.

the hospital would constitute not only an emergency circumstance but one that posed a serious and imminent threat to patient safety (thus allowing for disclosure). Although Dr. Ash-Bernal may have testified at trial that she did not perceive an immediate threat, the jury was free to disbelieve that portion of her testimony regarding the immediacy of a danger. *Small*, supra; *Keene*, supra. Because Matthew was seeking to leave GSMC with a psychiatric illness, in the middle of the night, all alone, and during a hurricane, it would be reasonable for the jury to disregard Dr. Ash-Bernal's testimony and determine that she actually perceived a serious and imminent threat to Matthew's safety. This is particularly true given that Dr. Ash-Bernal also testified that she had absolutely no recollection of Matthew or the events at issue, thus making it difficult for her to accurately tell the jury that she did not perceive a threat at the time she discharged Matthew. (Tr. 221, playing video depo of Ash-Bernal, pp.18, 21-22, ROA __; Tr. 528, 543-546, ROA ___). Her own note from that evening states that if Matthew left the hospital, "he could die from infection, seizures or as a result of his psychiatric illness." (GRSM Recs, ROA ___). Thus, viewing the evidence in the light most favorable to the Respondent, the jury could determine that Dr. Ash-Bernal actually perceived a serious and imminent threat and that the real reason that she did not call Matthew's emergency contact related to SMIS's negligent training creating a mistaken belief that HIPAA provisions would not allow David Scheer to be called. In other words, the jury could reasonably conclude that Dr. Ash-Bernal actually perceived an immediate danger but that SMIS's negligence in improper training and/or undertraining was the actual reason that David Scheer was not called.

III. The trial court did not commit error by allowing the introduction of evidence relating to training.

SMIS's final argument is that it is entitled to a new trial and that the lower court committed "manifest error" by admitting evidence relating to Appellant's claim against SMIS for failure to train/educate its physicians on HIPAA and permissible disclosures of information. (Initial Brief,

p. 26-28). SMIS contends it was not given notice that assertions relating to this issue would be made at trial. However, the trial court did not err in admitting such evidence, and SMIS cannot claim that it was surprised or prejudiced by the admission of evidence on this issue.

From its very inception, Respondent's claims involved direct corporate liability claims against SMIS relating to a failure to properly train its physicians. The initial Complaint specifically alleged SMIS breached duties to train and educate its physicians and asserted that SMIS was "negligent, grossly negligent, and careless in the following particulars: [...] d. failing to educate and otherwise train physicians as to the applicable legal standards and mechanisms to detain a mentally ill patient against his/her will; and e. in such other and further particulars as discovery or evidence at trial may reveal." (Complaint, ¶ *25, ROA* __). Filed on August 10, 2017, nearly two years before trial, Respondent's Amended Complaint alleged that SMIS was "negligent, grossly negligent, careless and reckless, in the following particulars: [...] e. failing to educate and otherwise train physicians and staff as to the ability, means, and mechanisms to detain a mentally ill patient against his/her will; and f. in such other and further particulars as discovery or evidence at trial may reveal." (Amended Complaint, ¶ *50, ROA* __).[19] Thus, as demonstrated by the very words contained within the Respondent's pleadings, claims against SMIS relating to negligent training of its physicians were always among the claims and issues in the case.

During the course of discovery in the litigation, Respondent became apprised that SMIS and its physicians had the mistaken belief that privacy provisions prohibited SMIS's doctors from

[19] Despite Paragraph 50 of the Amended Complaint being directed at "The Defendants" (which would undoubtedly include SMIS), Appellant argues that the allegation regarding training contained therein only applied to GSMC simply because, in a subsequent paragraph, Respondent's pleading reiterates an allegation that GSRM had failed to properly train/educate. Appellant's proposed interpretation ignores the plain language of Paragraph 50 being directed at "[t]he Defendants." Further, this argument was never made to the trial court and is not preserved for appellate review.

contacting David Scheer and apprising him of Matthew's change in condition (his psychotic outburst at approximately 1:15 AM) and desire to leave the hospital. Seemingly, SMIS and its physicians were unaware that the disclosure of health information is permissible when the disclosure is in the patient's best interest or may lessen the threat of harm to a patient or the public. The trial court correctly noted that after discovery and evidence revealed that SMIS and its physicians were misinformed about permissive disclosures of patient information for the purposes of patient safety, "Plaintiff contended SMIS failed to properly train its physicians on both the legal standard for commitment of a mentally ill patient and on the permissible disclosures of health information in situations/circumstances where disclosure would be in the patient's best interest and/or serve to lessen the potential for harm to a patient or the public." (Haye's Order, p. 9, ROA __). As the trial court correctly noted, SMIS cannot claim surprise or prejudice by this issue, for during two years of litigation, extensive discovery was conducted about permissive disclosures of patient information, as well as the training SMIS had provided (and failed to provide) to its employees on this topic. (Pl's Memo Opposing Post-Trial Motions, Ex. 1, Depo. of SMIS's 30(b)(6) Designee, ROA __; Ex. 2, Depo of GSMC's 30(b)(6) Designees ROA __; Ex. 3, Depo of Dr. Ash-Bernal Depo (pp. 61:25-66:8).

By way of example of the numerous occasions when this issue was addressed in the months prior to trial, the following written discovery was propounded to SMIS and demonstrates that the company was on notice of Respondent's allegations regarding inadequate training (and also shows that the company had inadequate knowledge of these administrative topics):

- INTERROGATORY: Describe any and all efforts that Southern Myrtle Inpatient Services, LLC, took, at any point in time between January 1, 1996 through December 31, 2016, to ensure that Dr. Nirlep Patel and/or Dr. Rachel Ash Bernal were educated on and familiar with the provisions contained within HIPAA.
- INTERROGATORY: List and describe any and all training that Dr. Nirlep

Patel and/or Dr. Rachel Ash-Bernal, received on the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) at any in the time period spanning January 1, 1996 through December 31, 2016.[20]

- INTERROGATORY: Identify any training sessions, seminars, classes, or other educational courses that Dr. Patel and/or Dr. Ash-Bernal have attended that in any way dealt with permissible disclosures under HIPAA. You may limit your response to sessions/seminars/classes/courses/etc. that occurred during the time period spanning from January 1, 2010 through the present. Include in your answer the location, date, and presenter of each training session, seminar, etc.
- REQUEST FOR PRODUCTION: With regard to the HIPAA training presentation referenced in the deposition of Southern Myrtle Inpatient Services LLC (taken on Dec, 5, 2018), provide a copy of all versions of this training presentation and other related training materials.
- REQUEST FOR ADMISSION: Admit that on October 3, 2015, Grand Strand Regional Medical Center had a system in place by which a healthcare provider could get answers to questions that he/she might have regarding permissible disclosures under HIPAA.

(Pl's Memo Opposing Post-Trial Motions, Ex. 5, ROA __). At deposition, Dr. Patel was specifically asked about his training on permissible disclosure and where he received it:

Q: Do you ever have the occasion to go to continuing education events about the dos and do not's of HIPPA?

A: We usually do, correct.

Q: The hospital on occasion provides those –

A: The hospital, **employers**, a variety of places, yes. There are usually updates and that sort of thing.

(Pl's Memo Opposing Post-Trial Motions, Ex. 4, Depo of Dr. Patel (p. 67:17-24, ROA __).

[20] Respondent would note that, as with much of the discovery process, SMIS was evasive and refused to provide a meaning response by stating: "ANSWER: Defendants object to this request as it is overly broad and unduly burdensome. Defendants further object to this request as it creates a burden not grounded in law and is cumulative and duplicative." SMIS, however, did not object to the interrogatory as being irrelevant. In contrast, after losing the trial, SMIS now claims that these same issues were irrelevant and should not have been admitted and feigns to have been prejudiced by the admission of any evidence on the topic.

Even when presented discovery questions worded directly from the very language of the Federal Code of Regulations, SMIS still demonstrated a lack of knowledge regarding when disclosure of patient information is permissible:

- REQUEST FOR ADMISSION 5: Admit that, under the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996), where a patient ls incapacitated due to mental infirmity/impairment, a health care provider is permitted to share the patient's health information with family, friends, or others involved in the patient's care or payment for care, so long as the healthcare provider determines, based on his/her professional judgment, that doing so is in the patient's best interests.

  RESPONSE: Denied as written.

- REQUEST FOR ADMISSION 5: Admit that., under the provisions of HIPAA (Health Insurance Portability and Accountability Act of 1996), even though a patient does not suffer from mental infirmity/impairment and has objected to his healthcare information being shared with a family member, a healthcare provider may, in spite of the patient's objection, share the patient's health information with a family member of the patient, if the healthcare provider has a good faith belief that the patient poses a threat to his own health or safety, and the family member is reasonably able to prevent or lessen that threat.

  RESPONSE: Denied as written.

(Pl's Memo Opposing Post-Trial Motions, Ex. 5, ROA ___).[21]

Because this issue of training on HIPAA had long been an issue in the case, it was not a surprise to SMIS. If necessary, Respondent could have moved to amend his pleadings and could have done so even after the verdict was rendered. See Rule 15(b), SCRCP (providing that amendment of the pleadings as may be granted as needed "to cause them to conform to the evidence" and that a party may move to amend "at any time, even after judgment"). Thus, should this Court determine that amendment to the pleading would have been prudent, since there was no surprise to SMIS, it was harmless error for the trial court to have admitted evidence relating to

[21] The wording within these requests to admit was taken directly from 45 CFR § 164.512(j) and 45 CFR § 164.510(b), and SMIS's response (or lack thereof) demonstrates a knowledge deficit on this important topic.

training issues. Had the trial court not found that the Amended Complaint sufficiently alleged issues relating to failure to train, Respondent could and would have moved to amend his pleading to conform to the evidence demonstrated at trial. See *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987) ("Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result."). However, there was no reason for Respondent to move to amend, for the trial court correctly found that the Amended Complaint, as written, was sufficient to allow evidence on training matters and SMIS had long since on notice of claims relating to training and issues of permissible disclosure. Since the inception of the case, SMIS has known that the training it provided (and failed to provide) to its physicians were at issue, and the company cannot claim to have been prejudiced by the trial court having allowed evidence on these topics.

IV. Should this Court find any error requiring a new trial, there must be a new trial absolute as to all claims and against all defendants

If a verdict is determined to be factually irreconcilable, "the proper and most consistent approach of treating such verdicts is to require, upon request, the trial court to re-submit the matter to the jury." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 562-63, 619 S.E.2d 5, 10 (Ct. App. 2005). "If the jury cannot reach a consistent verdict, the trial court may then order a new trial *nisi* or a new trial absolute. However, the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party." *Id.*

In the present case, neither side moved to resubmit any issues to the jury while they were still empaneled, and the Appellant cannot now argue that any such irregularity exists, unless they demand a new trial **for all parties, as to all claims**. Where neither party timely moves the trial court to resubmit the matter to the jury, the trial court has no duty or authority to do so, and neither the parties to the litigation nor the court should be required to guess what the jury sought to

accomplish. *Id.* In those situations, verdicts which are irreconcilably inconsistent should not stand, and a new trial absolute should be granted because the parties and the judge "should not be required to guess as to what the jury sought to render." *Prego v. Hobart,* 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985). Thus, should this Honorable Court find error and the verdict irreconcilable, on remand to the trial court, a new trial against all parties is required.

CONCLUSION

Respondent pled and put forth evidence of direct, corporate negligence and there is no inconsistency with the jury's verdict. A healthcare provider has a legal duty to ensure that its staff is not undertrained. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, supra. Furthermore, even if such a duty did not exist, SMIS undertook training thereby creating the duty. In the present case, the jury's logic is discernable – in light of the various claims submitted, the jury was free to conclude that SMIS's employee was handicapped as a result to SMIS's failures to properly train her relating to HIPAA's permissible disclosures and on the process of temporarily detaining a patient. Thus, as determined by the jury, liability rests solely against SMIS via Respondent's direct corporate liability claims. There was ample evidence to conclude that, had SMIS properly trained its employee and ensured that she was appropriately knowledgeable about permissible disclosures for patient safety and the process for temporary detainment, SMIS's physician would have contacted David Scheer (or placed a temporary involuntary hold) and prevented Matthew's death.

Viewing the evidence in the light most favorable to the Respondent, there is ample evidence, both direct and circumstantial, by which the jury could logically reach the verdict it did. Accordingly, and for the reasons set forth above, the jury's verdict must stand and Judge Hayes' order must be affirmed.

<signature on page following>

Respectfully submitted,

May 22, 2020
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III

Case No. 2017-CP-26-1571
Appellate Case No. 2019-001665

David L. Scheer, as Personal Representative of the Estate of Matthew J. Scheer, ...Respondent,

v.

Southern Myrtle Inpatient Services, LLC, Nirlep A. Patel, M.D. and Rachel Ash-Bernal, M.D.....Defendants,

Of which
Southern Myrtle Inpatient Services, LLC is.....Appellant.

PROOF OF SERVICE

The undersigned, counsel for Respondent, does hereby certify that, on the date indicated below, all counsel of record in this action were served with a copy of RESPONDENT'S INITIAL BRIEF and RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL, by depositing same in the United States Mail, first-class postage pre-paid, to the following:

COUNSEL: Robert L. Widener, Esq.
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Attorney for Appellant

<signature on page following>

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May 22, 2020

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

RE: Scheer vs. Southern Myrtle Inpatient Services, LLC, *et al.*
Case No.: 2017-CP-26-01571
Appellate Case No. 2019-001665
Our File No.: 79595-50893

Dear Ms. Kitchings,

Enclosed for filing and regarding the appeal identified above, please find the original and two copies of *Respondent's Initial Brief* and *Respondent's Designation of Matter to be Included in Record on Appeal*, along with the Proof of Service to opposing counsel. I would respectfully request that you please return a file-stamped copy in the enclosed self-addressed stamped envelope.

Should you have any questions or concerns, please do not hesitate to contact me.

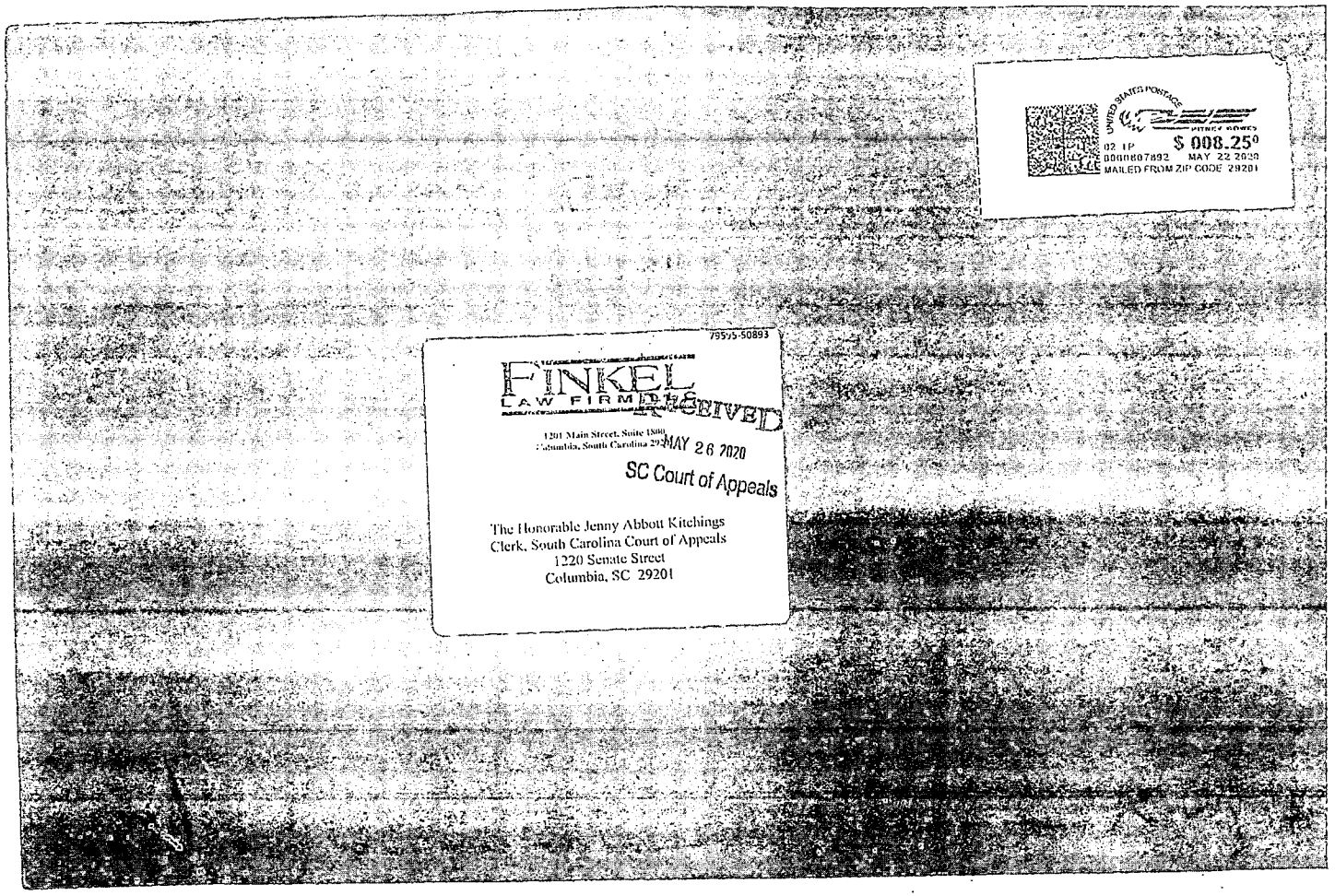
With kind regards, I remain,

Sincerely yours,

Francis M. "Brink" Hinson, IV

Enclosures (*as noted above*)

cc: Robert L. Widener, Esq.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