

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2019-001145 / Lower Case No. 2017-CP-40-00517

Jackie Eadon Chalfant, Individually and as a Personal Representative of the Estate
of Michael Dallas Chalfant.....Appellant

v.

Carolinas Dermatology Group, P.A., a South Carolina Professional Association,
and Mark G. Blaskis, M.D., Individually.....Respondents

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in Appellant's Initial Brief, the Appellant offers the following points of clarification and/or rebuttal to the arguments raised in Respondents Response Brief, as follows:

I. **THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF FOR FAILURE TO ESTABLISH ALL ELEMENTS OF MEDICAL MALPRACTICE CLAIMS BY EXPERT WITNESS TESTIMONY WHEN THE COMMON KNOWLEDGE EXCEPTION WAS APPLICABLE BECAUSE THE EVIDENCE INTRODUCED AT TRIAL ESTABLISHED THE DEFENDANTS FAILURE TO PROVIDE PLAINTIFF WITH AFTER-HOURS CONTACT INFORMATION AND POST-SURGERY INSTRUCTIONS**

A. *Respondent argues that the Common Knowledge Exception was Not Plead, the Trial Court Properly Denied Appellant's Untimely Motion to Amend to Allege the Common Knowledge Exception, and Notwithstanding, the Common Knowledge Exception Does Not Apply to Dr. Blaskis' Discharge Instructions and Post-Surgical Instructions.*

The Respondents erroneously attempt to frame the issue related to the application of the Common Knowledge Exception as a pleading error, that the Common Knowledge Exception is a pleading requirement that must be specifically plead, distinct and separate from the pleading requirements of a medical malpractice action/count. Respondents fail to cite to any caselaw which supports its position. Material hereto, no argument was made or has been made throughout the underlying proceedings that Appellant did not properly frame within its pleadings that one of the basis for Appellant's claim for Medical Malpractice – Wrongful Death Negligence/Gross Negligence against the Defendants / Respondents in this matter was that Respondents breached the standard of care by failing to provide a clear, reasonable method for a patient to reach their physician after hours regarding complications. (Complaint; Answer; Reply)

“Our Supreme Court has found a plaintiff is required to prove the following facts by a preponderance of the evidence to establish a cause of action for medical malpractice: (1) The

presence of a doctor-patient relationship between the parties; (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances; (3) The medical or health professional's negligence deviating from generally accepted standards, practices and procedures; (4) Such negligence being a proximate cause of the plaintiff's injury; and (5) An injury to the plaintiff.” *Turner v. Med. Univ. of S.C., Opinion No.5723 (S.C. App. 2020) citing Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (S.C. 2014).*

““Our Supreme Court has found that expert testimony is not required in a medical malpractice case to show that the defendant breached the standard of care when “the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts.”” *Turner v. Med. Univ. of S.C., Opinion No.5723 (S.C. App. 2020) citing Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (S.C. 1978).* Consequently, the Common Knowledge Exception applies to the evidence required to satisfy the third (3) prong of a cause of action for medical malpractice, “the medical or health professional's negligence deviating from generally accepted standards, practices and procedures”.

The Court found at trial the Appellant/Plaintiff's expert witness did not establish that Respondent breached the standard of care as it related to providing a clear, reasonable method for a patient to reach their physician after hours regarding complications (Transcript pp. 651-668;705-713). Appellant argued that even if the Court was correct that Plaintiff's expert did not specifically testify that Respondent breached the standard of care (which we do not concede), that nonetheless, the Common Knowledge Exception applies in this instance as “providing a clear, reasonable method for a patient to reach their physician after hours regarding complications” and whether that standard was breached falls within the purview of a laymen (as further discussed below) and as

such, Plaintiff satisfied the threshold to submit the issue to the jury.

Notwithstanding Respondents' misplaced arguments related to the form of the pleadings, Respondents argue that the Common Knowledge Exception is inapplicable in this case as a breach of the standard of care related to providing a clear, reasonable method for a patient to reach their physician after hours regarding complications is medical in nature, involving very specific needs and requirements depending on the type of practice, the type of patient, and complex health care laws, that a common layperson could not understand. However, the application of Common Knowledge Exception in this situation centers solely on the contact information provided to the Appellant / Decedent on Dr. Blaskis' discharge instructions in relation to the after-hours prompt in effect on the date of surgery, and whether that contact information was a clear, reasonable method for a patient to reach their physician after hours regarding complications. The type of practice, the type of patient, and healthcare laws are not relevant to this analysis, as further evidenced in the following facts.

Defendant, Dr. Blaskis provided the Appellant / Decedent with one (1) page of discharge instructions. On that discharge instruction form, it states, "Please call us with any questions at (803) 771-7506 ext. 209". (Exhibit P-1). When the Appellant had questions or concerns for Dr. Blaskis related to the Decedent bleeding from the surgical site, she dialed the number (803) 771-7506, as instructed. The call was made at 7:10p.m., after-hours, which triggered the after-hours prompt. The after-hours prompt stated the following:

"You have reached Carolinas Dermatology After-Hours. If this is a true emergency, please hang up now and dial 911. If you know your party's extension, you may dial it now. (emphasis added)."

(Exhibit P-3)

The Plaintiff dialed extension 209 as instructed on the discharge form provided by Dr.

Blaskis. The Appellant was connected to Dr. Blaskis' nurses station. The Appellant left a voicemail for Dr. Blaskis that the Decedent's ear was bleeding and she did not know what to do. The Plaintiff expected a call back, which she never received. (Transcript pp. 579-584; 589-596; 620-626; Exhibit P-1). Although Defendants did have an after-hours answering service, Dr. Blaskis was aware that if you dial the extension as instructed on his discharge form, that a patient will not be connected to the answering service, and that the extension will lead you to a voicemail which would not be checked after-hours.. (Transcript pp. 273-278; 591-594; Exhibit P-4; P-17)

The after-hours prompts for Respondent Practice, CDG, from October 2013 through June 2017, state the following:

October 2013 After-Hours Script: "You have reached Carolinas Dermatology After-Hours. If this is an emergency, please hang up and dial 911 or press 9 now for our answering service (emphasis added). If you know your party's extension, you may dial it at any time during this message. To hear our automated options, press 1. To leave us a message in our general voice mailbox, press 2. To hear these options again, press the * key."

May 2015 After-Hours Script (day of surgery): "You have reached Carolinas Dermatology After-Hours. If this is a true emergency, please hang up now and dial 911. If you know your party's extension, you may dial it now (emphasis added). To hear our automated options press 1. For a prescription refill or to leave a message to be returned on the next business day, please press 2. For all other serious medical concerns, dial 9 now for our answering service. To hear these options again, press the * key."

June 2017 After-Hours Script (after lawsuit filed): "You have reached Carolinas Dermatology After-Hours. If this is a true medical emergency, please hang up now and dial 911. For all other serious medical concerns, press 9, and you will be directed to our answering service (emphasis added). If you know your party's extension, you may dial it now or any time during this message. To hear our automated options, press 1. If you would like to leave a refill request, or leave a message for your physician to be returned the next day, press 2."

(Exhibit P-3)

The facts as recited above, by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, fall squarely within the ambit of common knowledge or experience of a layperson. The written discharge sheet was inadequate in instructing the

Appellant / Decedent how to contact Dr. Blaskis after-hours, and actively prevented the Appellant / Decedent from doing so. On the day of the surgery, the after-hours telephone prompt immediately states “If you know your party’s extension, you may dial it now”. Dr. Blaskis knew that if a patient dialed the extension, it would not go to the answering service, but he nonetheless included the extension on his discharge instructions provided to Decedent. (Transcript pp. 276-277). Appellant was clearly attempting to contact Dr. Blaskis by following the written instructions exactly as provided. By following the written discharge instructions exactly, the Decedent was not able to get the help he needed and died as a result.

On the singular issue of whether Respondents breached the standard of care of providing a clear, reasonable method for a patient to reach their physician after hours regarding complications, by providing a discharge form which included instructions to dial an extension if the patient had any questions, but which Dr. Blaskis knew if a patient dialed the extension, it would not go to the live answering service when the Defendant practice in fact had a live answering service available after-hours who would immediately connect the patient with their physician, lies within the ambit of common knowledge or experience of a layperson. The Trial Court erred in granting directed verdict against the Plaintiff for failure to establish all elements of medical malpractice claims by expert witness testimony when the common knowledge exception was applicable to this breach of the standard of care. Sufficient evidence exists, in light most favorable to the Plaintiff/Appellant, to warrant submission to the jury.

B. Respondents Argue the Trial Court Properly Found Lack of Proximate Cause / No Reasonable Jury Could Find that Respondents’ Negligence Surpassed Appellant’s Negligence

Respondents argue that regardless of whether a breach of the standard of care occurred as further described above, that no proximate cause exists which caused Decedent’s death and/or no

reasonable jury could find that Respondent's negligence was greater than Appellant's negligence. Respondent's argument is based on the fact that Appellant, Ms. Jackie Chalfant, considered taking her Husband to the Emergency Room that evening, that two (2) laypeople with no medical training told her she should call 911 / take him to the emergency room, and that Dr. Blaskis had never had a patient die from this type of surgery before. (Transcript pp.301; 632; 638-640; 712) However, this is not the only evidence presented on this issue, and in light most favorable to the non-moving party, causation was established warranting submission of the issue to the jury.

“On review, an appellate court will affirm the granting of directed verdict in favor of the defendant when there is no evidence on any one element of the alleged cause of action” *Fletcher v. Med. Univ. of S.C.*, 458, 462, 702 S.E.2d 372, 374 (S.C. Ct. App. 2010). It is undisputed by both Plaintiff's expert witness and the Defendant himself, Dr. Blaskis, that if Plaintiff / Decedent was able to contact Dr. Blaskis on May 12, 2015, the Decedent would not have died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D.. (Transcript pp. 330-337; 488; 490) Plaintiff was clearly attempting to contact Dr. Blaskis by following the written instructions.(Transcript pp. 591-594) By following the improper written discharge instructions exactly, the Decedent was not able to get the help he needed and died.

Appellants argument that, as a matter of law, Appellant's negligence exceeded any alleged negligence by the Respondents, is an issue of fact for the jury to decide. Dr. Blaskis never told the Appellant or his wife, Ms. Jackie Chalfant, that bleeding was an emergency and required immediate attention. Nonetheless, Jackie Chalfant called the practice and followed the discharge instructions in relation to the after-hours prompt precisely as instructed. Ms. Chalfant expected a call back, and was scheduled to see a plastic surgeon the following day. (Transcript pp. 579-584;

589-596; 620-626).

This evidence, in light most favorable to the Plaintiff / non-moving party, can establish that Appellant / Decedent's inability to reach Dr. Blaskis after hours regarding complications proximately caused his death. In light most favorable to the Plaintiff, the issue should have been submitted to the jury.

II. THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF AS THERE EXISTED CONFLICTING TESTIMONY REGARDING BREACH OF STANDARD OF CARE RELATED TO POST-SURGERY INSTRUCTIONS

A. Respondents Argue that Appellant Failed to Establish By Expert Testimony that Dr. Blaskis Breached the Standard of Care, and that Regardless, Appellant Failed to Establish Causation

Both Plaintiff's Expert witness and Defendants' Expert witness established that it is within the standard of care to discuss before, during, and after surgery about the risks associated with the surgery, in this case, the risk of post-operative bleeding, which is a major concern following Mohs surgery. Failure to provide post-operative instructions related to bleeding would be a breach of the standard of care. (Transcript pp. 407; 427-428; 481-482). Both expert witnesses admit that it is within the standard of care to provide these post-operative instructions verbally. (Transcript pp. 427-428; 481). In this case, there is unequivocal, conflicting testimony as to whether Defendant, Dr. Blaskis, provided the Decedent / Plaintiff post-operative instructions related to the risks of bleeding.

““In deciding [directed verdict] motions, “neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.”” *Creech v. S.C. Wildlife and Marine Resources Dept*, 328 S.C. 24, 491 S.E.2d 571 (S.C. 1997). “In essence, the appellate court must determine whether a verdict for a party opposing the motion

would be reasonably possible under the facts as liberally construed in his favor. *Guffey v. Columbia/Colleton Reg. Hosp.*, 612 S.E.2d 695, 364 S.C. 158 (S.C. 2005) *citing Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (S.C. 2002) (citation omitted).

Dr. Blaskis alleges he provided extensive post-operative instructions to the Appellant / Decedent verbally related to bleeding from the surgical site, and if that occurred, to call him immediately. Dr. Blaskis admits that he did not provide any written, post-operative instructions related to bleeding. (Transcript pp. 271-273; 277)

Appellant / Decedent's Wife, Ms. Chalfant, was with the Decedent the entire time he was at Carolinas Dermatology Group, P.A., both pre-surgery, during surgery, and post surgery. Ms. Chalfant heard everything that was said and all instructions provided to the Decedent. Ms. Chalfant and Decedent were not provided with any post-operative instructions, whether verbal or in writing, related to bleeding by either Dr. Blaskis or any member of his staff. The only post-operative instruction given to the Appellant / Decedent was to not touch the bandage under any circumstances. (Transcript pp. 579-584; 589-596; 620-626; Exhibit P-1).

Plaintiff's expert witness was not able to testify that Dr. Blaskis breached the standard of care as it was unclear whether the instructions were given verbally or not. There was no indication in the medical records whatsoever that Dr. Blaskis provided post-operative instructions related to bleeding, whether verbally or in writing, and if that was the case, that would constitute a breach of the standard of care. Although he had concerns whether Dr. Blaskis adequately educated the patient as to the risks of bleeding based on the sequence of events in this case, he was not able to establish within a reasonable degree of medical certainty that a breach of the standard of care occurred with the records before him. (Transcript pp. 447-448; 452; 455-456; 459-460; 481-489).

The trial Court erred in granting Defendants' Motions for Directed Verdict against the

Plaintiff as their existed conflicting testimony regarding whether Respondents' breached the standard of care related to post-surgery instructions. Dr. Blaskis states that he gave post-operative instructions related to bleeding verbally. Appellant states that Dr. Blaskis never gave any post-operative instructions, whether written or verbal, related to the risks of bleeding. Given these facts and taken in light most favorable to the Plaintiff / Appellant, a verdict for the Plaintiff was reasonably possible to warrant submission to the jury to resolve conflicts in the testimony.

Respondent's erroneously argue that risks of bleeding were clearly outlined in the operative permit that Appellant signed prior to surgery. However, those were informed consent forms executed prior to surgery related to the risks associated with the surgery, and had no bearing on the standard of care related to post-operative instructions, as clearly established by both expert witnesses. (P-4; Transcript pp. 407, 427-428, 481-482)

Respondents argue that regardless of whether a breach of the standard of care occurred as further detailed above, that Appellant failed to establish that that breach caused Decedent's injury.

When both expert testimony and circumstantial evidence of a physician's culpability are presented, the inquiry need only be whether there was sufficient competent evidence from which the jury may have inferred a causal connection. *Green v. Lilliewood*, 249 S.E.2d 910, 272 S.C. 186 (S.C. 1978). In considering the sufficiency of circumstantial evidence, the facts and circumstances should be assessed in light of ordinary experience and common sense. *Green v. Lilliewood*, 249 S.E.2d 910, 272 S.C. 186 (S.C. 1978) citing Prosser, Law of Torts, p. 242 (1971); Dooley, Modern Tort Law, §34.108(1977); *Barnwell v. Elliott, et al.*, 225 S.C. 62, 80 S.E.2d 748 (1954); *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521 (1965). This general proposition of tort law has been applied in medical malpractice cases as an exception to the general rule requiring expert medical testimony to establish proximate cause. *Id.* "...there is an exception to

the rule in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts.” *Id.*

Strong circumstantial evidence of Respondents’ negligence rise from the causal sequence of events in this case. Appellant / Decedent was not given post-operative instructions related to the emergent nature of bleeding in his case. The Appellant / Decedent went home and followed the after-hours instructions to call Dr. Blaskis if they had any questions, because they were not aware that bleeding was serious medical concern. Plaintiff was told by two friends to go to the emergency room, but Decedent was scheduled to see a plastic surgeon for a follow-up appointment the following day. Plaintiff would have gone to the emergency room if she was told that bleeding was an emergency. (Transcript pp.265; 275-279; 307; 579-584; 589-596; 620-626; Exhibit P-1) Decedent died in his sleep from bleeding from the surgical site. (Transcript pp. 367; 377; Exhibit P-18).

Both Plaintiff’s Expert and Defendant, Dr. Blaskis himself, testified that if the Decedent had been able to communicate with Dr. Blaskis or any medical professional related to bleeding, a medical professional could have stopped the bleeding and saved his life. (Transcript pp. 337; 461-462; 488-489). The coroner’s investigation conducted by Amy M. Durso, M.D. determined that Michael Dallas Chalfant died as a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (Transcript pp. 367; 377; Exhibit P-18).

Both experts established the standard of care, and failure to provide instructions as to post-surgery risks is a breach of the standard. To the extent that the testimony of Plaintiff’s expert, Sean Christensen, and the testimony of the Defendant, Dr. Blaskis, whom both state that if Plaintiff was able to get ahold of Dr. Blaskis or a medical professional related to bleeding from the surgical

site, the Decedent would have been saved and would not have died on May 13, 2015, does not establish proximate cause of Decedent's injury in this case, that circumstantial evidence that is within the common knowledge of the jury based on the sequence of events which followed Defendant, Dr. Blaskis' breach of the standard of care, to wit: his failure to provide post-operative instruction related to bleeding, and Decedent's subsequent death due to bleeding from the surgical site presents sufficient evidence to establish proximate cause.

III. **THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT AGAINST THE PLAINTIFF WHEN CONFLICTING TESTIMONY BY DEFENDANT'S EXPERT WITNESS CREATED A QUESTION OF FACT REGARDING DEFENDANTS' BREACH AS TO STANDARD OF CARE WHERE THE DEFENDANTS' EXPERT TESTIFIED THAT HE WOULD NOT HAVE OPERATED ON THE DECEDENT BECAUSE DECEDENT'S TACHYCARDIA WAS A CONTRAINDICATION TO PERFORMING SAID SURGERY ON MAY 12, 2015 WITHOUT PROPER CARDIAC FOLLOW-UP**

A. *Respondents Argue that Respondents Expert Witness Testimony Created No Conflict Regarding Dr. Blaskis Treatment of Mr. Chalfant, and that Notwithstanding, It is Uncontested that Tachycardia Played No Role in Mr. Chalfant's Death.*

Respondents' erroneously argue that Respondent's expert witness, Dr. Pearson Lang, simply "updated" his testimony at trial and created no conflict regarding Dr. Blaskis' treatment of the Decedent, although his "updated" testimony resulted in total, substantial and material change in his expert opinion from his deposition taken not 60 days earlier, and that the court took that into consideration and properly granted the Motion for Directed Verdict as it was proper for the Court to resolve the conflicting testimony. The basis for his "updated" testimony was the receipt and review of supplemental medical records from Decedent's primary physician which Dr. Blaskis did not have in his possession on the day of surgery.

Dr. Pearson Lang, Defendant's expert witness, and Dr. Sean Christensen, Plaintiff's expert witness, established the standard of care for a doctor was to provide their patient with a thorough

and careful examination before subjecting the patient to surgery, and that it would be breach of the standard of care if a doctor failed to provide a thorough and careful examination before surgery. (Transcript pp. 447-448; 452; 457-458). Both expert witnesses testified that if a patient presented with a heart rate over 100, a doctor would want further evaluations or assessments prior to surgery. (Transcript pp. 410-415; 447-448; 452; 457-458).

““In deciding [directed verdict] motions, “neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.”” *Creech v. S.C. Wildlife and Marine Resources Dept*, 328 S.C. 24, 491 S.E.2d 571 (S.C. 1997). “In essence, the appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. *Guffey v. Columbia/Colleton Reg. Hosp.*, 612 S.E.2d 695, 364 S.C. 158 (S.C. 2005) *citing Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (S.C. 2002) (citation omitted).

The Defendant’s own expert witness, Dr. Pearson Lang, stated in his deposition, a mere 60 days prior to trial, that the Decedent was tachycardic, that he would not perform surgery on the Decedent, that he would send him out for further cardiac assessment, and that he unequivocally would not have performed surgery on the Decedent on May 12, 2015. (Transcript pp. 412-415)

The Trial Court erred in granting directed verdict against the Plaintiff when conflicting testimony by Defendants’ expert witness created a question of fact regarding Defendants’ Breach as to Standard of Care where the Defendants’ Expert testified that he would not have operated on the Decedent because Decedent’s tachycardia was a contraindication to performing said surgery on May 12, 2015 without proper cardiac follow-up. Dr. Pearson Lang clearly had conflicting testimony related to Decedent’s tachycardia and whether he would perform surgery on May 12, 2015. Dr. Lang attempted to change his testimony at trial based on being provided with medical

records from the referring doctor, records that Defendant Dr. Blaskis did not have on the day of surgery, May 12, 2015. (P-4; 436-439)

As to causation, Appellant does agree that the actual cause of death of Mr. Chalfant was a result of blood loss or exsanguination due to hemorrhage from the left ear surgery site performed by the Defendant, Mark G. Blaskis, M.D. (Transcript pp. 367; 377; Exhibit P-18). However, but for Appellant's breaches of the standard of care as to his failure to recognize Decedent's tachycardia, and sent him out for further evaluation, the surgery would not have occurred on May 12, 2015. If the surgery would not have occurred on May 12, 2015, Michael Dallas Chalfant would not have died on May 13, 2015. Given these facts and taken in light liberally most liberally construed in favor of Plaintiff / Appellant, a verdict for the Plaintiff was reasonably possible to warrant submission to the jury.

CONCLUSION

Based upon the foregoing, in addition to the arguments made in the opening brief, these Appellant respectfully submit that the Court is obliged to reverse the Trial Court's entry of Directed Verdict against the Plaintiff and remand for further proceedings.

Dated: August 27, 2020

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of Michael Dallas Chalfant.....Appellant

v.

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and Mark G. Blaskis, M.D., Individually.....Respondents

PROOF OF SERVICE

I certify that I have served (1) Initial Reply Brief of Appellant; and (2) Appellant’s Updated Designation of Matter to be Included in the Record on Appeal, in compliance with Rules 208 and 209 SCACR, on Carolinas Dermatology Group, P.A., a South Carolina Professional Association, and Mark G. Blaskis, M.D., Individually, by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2020, addressed to their attorney of record, Martin S. Driggers, Jr., Esq., SWEENY, WINGATE & BARROW, P.A., 115 Cargill Way, Suite B, Hartsville, South Carolina 29550 and by electronic mail to Martin S. Driggers, Jr., Esq., at MSD@swblaw.com on August 26, 2020.

Dated: August 27, 2020

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