THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Case No. **2019-001145**

Jackie Eadon Chalfant,
Individually and 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.

RESPONDENTS' FINAL BRIEF

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COUNTER-STATEMENT OF THE CASE

On January 30, 2017, Appellant filed a medical malpractice complaint against Respondents Dr. Mark G. Blaskis, M.D. (Dr. Blaskis) and Carolinas Dermatology Group, P.A. (Carolinas Dermatology). (R. p. 8-31; Summons and Complaint). The Complaint alleges (1) Medical Malpractice – Wrongful Death Negligence/Gross Negligence against both Dr. Blaskis and Carolinas Dermatology, and (2) Medical Malpractice—Wrongful Death Negligence/Gross Negligence against Carolinas Dermatology only. (R. p. 22-31; i*d.*).

On March 3, 2017, the Respondents filed an Answer denying the substance of Appellant's causes of action and alleging thirteen affirmative defenses, including but not limited to Comparative Negligence, Physical Infirmities, Release, Consent, Negligence by Third Party, Intervening Causes by Third Party, and Sole Acts of Another Party. (R. p. 41-49; Answer).

Jury trial on this matter began on June 4, 2019. On or about June 6, 2019, the Appellant rested her case, and thereafter the trial court heard the parties' Motions for Directed Verdict. (*See* R. p. 278-279; Transcript of Record at 649:18-650:8). The Trial Court denied Appellant's Motions for Directed Verdict and granted Respondents' Motions for Directed Verdict. (R. p. 297-305; Transcript of Record 705:14-713:22). The Court found, among other things, that no expert testified that Dr. Blaskis breached his duty of care or that the Appellant's injury most probably resulted from Dr. Blaskis alleged negligence. (*See* R. p. 302-304; Transcript of Record 710:22-712:14). The Court further found that the pathologist, Dr. Amy Durso, testified that the cause of death was loss of blood, that it would have taken several hours, and that it was not related to any other medical condition including heart issues. (R. p. 303-304; Transcript of Record 711:24-712:2). The Court found decedent knew he was experiencing bleeding from the surgery early in the day, that his wife provided a napkin or tissue to clean up the blood, that he continued to bleed after dinner, that he

continued to bleed while watching TV before retiring to bed at 10:30pm, and that he changed his bloody t-shirt and dress shirt. (R. p. 304; Transcript of Record 712:2-8). The court found that, according to the uncontroverted testimony:

> [Mr. Chalfant's] wife tried to convince him to go to the ER, but he refused to do so. Wife's close friends, Ms. Sam Compton, at 9:25PM, and Mr. Bob White at 7:43PM, testified that, in separate phone calls some time prior to 10:00PM, wife wanted the decedent to seek help at the ER, but he refused to do so.

(R. p. 304; Transcript of Record 712:9-14). The Court found its rulings extended to the practice as well. (R. p. 304-305; Transcript of Record 712:15-713:18).

The Court entered a Form 4 order memorializing its grant of directed verdict for Dr. Blaskis on June 7, 2019. (R. p. 2; June 7, 2019 Order). On June 21, 2019, the Court entered a second Form 4 indicating that directed verdict was also entered as to Carolinas Dermatology, which had been inadvertently omitted from the June 7, 2019 Order. (R. p. 3; June 21, 2019 Order).

Appellant filed no post-trial motions. However, on July 8, 2019, Appellant filed a Notice of Appeal. (R. p. 52-53; Notice of Appeal). On July 18, 2019, Appellant filed Amended and Second Amended Notices of Appeal to correct defects in the original Notice. (R. p. 54-55, 56-57; Amended Notice of Appeal and Second Amended Notice of Appeal).

On August 12, 2019, this Court dismissed Appellant's appeal for failure to timely order the transcript under Rule 207, SCACR and per correspondence from the Court dated July 26, 2019. (R. p. 6, 58-59; Order Dismissing Appeal; July 26, 2019 Letter). The Appellant filed a Motion to Reinstate on August 29, 2019, and the Court reinstated the Appeal on November 7, 2019. (R. p. 7, 60-64; Motion to Reinstate; Order Reinstating Appeal).

STANDARD OF REVIEW

In a medical malpractice action, the plaintiff must establish proximate cause as well as the negligence of the physician. *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163,

612 S.E.2d 695, 697 (2005). "[W]here there is no evidence on any one element of the alleged cause of action," the directed verdict will be affirmed. *Id.* "The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008). "In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Id.* "However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." *Id.* "In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. *Id.* When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Id.*

FACTS

Plaintiff/Appellant's allegations primarily relate to Dr. Blaskis' post-surgical instructions regarding potential complications, and in particular, regarding bleeding, following Dr. Blaskis' treatment of the decedent, Mr. Michael Chalfant, for cancerous skin lesions on his left ear. (*See generally*, Appellant's Final Brief).

Defendant Dr. Blaskis is a board certified dermatologist with a fellowship in Mohs surgery. At the time of trial, he had been practicing for over 36 years and had treated over 20,000 patients. (*See* R. p. 129; Transcript of Record at 270:7-9). The defendant Carolinas Dermatology is a dermatologist practice in Columbia, South Carolina, and Dr. Blaskis is an owner/employee of the practice. (*See* R. p. 126-127; Transcript of Record at 262:24-263:1).

Mr. Chalfant was referred to Dr. Blaskis for surgery by Mr. Chalfant's personal physician, Dr. Peter Stahl. (*See* R. p. 180; Transcript of Record at 411:1-3). On April 2, 2015, Dr. Blaskis examined Mr. Chalfant and scheduled him for surgical removal of the lesions to take place May 12, 2015. (*See* R. p. 173; Transcript of Record at 381:22-24). As to the April 2, 2015 evaluation, there are no criticisms. (*See, e.g.*, R. p. 216; Transcript of Record at 475:7-13). In addition, Appellant's expert Dr. Christensen testified that the informed consent issued to Mr. Chalfant—including as to the risks for bleeding—was "totally adequate". (R. p. 208; Transcript of Record at 455:13-15).

At the May 12, 2015 appointment, Dr. Blaskis removed the lesions using Mohs Micrography Surgery, a process involving removal of layers of tissue incrementally with contemporaneous pathological examination of each layer so as to permit more precise removal of the cancerous tissue with less removal of healthy tissue. (*See* R. p. 146; Transcript of Record at 314:16-25). The surgery to Mr. Chalfant's ear necessitated "through and through" removal of tissue, meaning that a portion of the surgical wound proceeded fully through Mr. Chalfant's ear in order to fully remove the cancer. (*See* R. p. 147; Transcript of Record at 324:2-14). Dr. Blaskis referred Mr. Chalfant to a plastic surgeon, Dr. Brett Carlin, for surgical wound repair to occur the next morning, May 13, 2015. (*See, e.g.*, R. p. 148; Transcript of Record at 328:11). It is undisputed that Dr. Blaskis' Mohs surgical procedure was properly performed. (*See, e.g.*, R. p. 207; Transcript of Record at 454:20-24). It is also undisputed that his referral of Mr. Chalfant for plastic surgery the next day was appropriate and within the standard of care. (*See, e.g.*, R. p. 217; Transcript of Record at 479:20-22).

Appellant's claims arise in relation to events following Mr. Chalfant's surgery. After surgery, it is undisputed that Dr. Blaskis provided post-surgical wound care instructions and

information, including verbal and written instructions. (R. p. 240, 305; Transcript of Record 583:11-23; Exhibit P-1)). The written instructions included Carolinas Dermatology's phone number and a direct extension to Dr. Blaskis' personal nurses' station to call should they have any problems or questions. (R. p. 305; Exhibit P-1). On appeal, however, Appellant disputes whether the post-operative verbal instructions discussed bleeding. (*See, e.g.*, Appellant's Final Brief at 9). While Appellant's brief also disputes whether the post-operative instructions addressed alcohol use, this does not appear to be an issue on appeal and moreover, alcohol consumption was not found to be a contributing cause of Mr. Chalfant's death. (*See generally* Appellant's Final Brief; R. p. 168-169, 175; Transcript of Record at 369:7-370:1; 390:21-23). No expert testified that Dr. Blaskis' breached any standard of care with regards to these instructions, and in fact Appellant's expert, Dr. Christensen, does not even give instructions regarding alcohol unless he is asked. (R. p. 226; Transcript of Record at 489:11-18).

While it is uncontested that Dr. Blaskis' provided Mr. and Mrs. Chalfant both verbal instructions and written instructions, Dr. Blaskis preferred verbal instructions over a piece of paper because with verbal instructions, he can look the patient in the eye to be sure the instructions are understood. (R. p. 137, 305; Transcript of Record at 278:3-10; Exhibit P-1). This is how he was trained, and thus while he also gave certain written instructions, he felt it was also very important to give preoperative instructions, to talk to the patients during the surgery, and to give extensive post-op instructions. (*See* R. p. 128-129; Transcript of Record at 269:22-270:11). He further testified that in 36 years and with over 20,000 patients, he had never encountered prior issue in relation to his operative instructions. (*See* R. p. 129, 131; Transcript of Record at 270:6-11; 272:15-17).

The surgery ended at approximately 4 p.m. (R. p. 258; Transcript of Record at 621:2-3). After arriving home, Mr. Chalfant began to bleed, and by 6:30 or 7:00 p.m., the bleeding was sufficient that Mrs. Chalfant was able to see it escaping from under the bandage. (*See* R. p. 259; Transcript of Record 622:7-9). Mrs. Chalfant gave Mr. Chalfant a paper towel at that time, and then continued to provide paper towels throughout the evening. (R. p. 260; Transcript of Record 623:9-13). She also provided him with medical gauze. (R. p. 264-265; Transcript of Record 627:20-628:11, 628:19-22). He continued using paper towels and gauze throughout the evening and into the night, but these were insufficient to prevent the blood from puddling and from going through his dress shirt to his undershirt. (R. p. 266, 267; Transcript of Record 630:13-23, 631:20-24). According to the coroner and the pathologist, the clothing was "saturated in blood." (R. p. 172; Transcript of Record 379:20-24).

By 7:10 p.m. that evening, Mr. Chalfant's bleeding was already sufficiently concerned she called Carolinas Dermatology, which she knew was closed. (R. p. 260, 265; Transcript of Record 623:17-21, 628:13-17). She reached the after-hours recording which states:

> 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. 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.

(R. p. 307; Exhibit P-3). Instead of dialing the answering service, Mrs. Chalfant dialed the extension, reached a second recording, and left a message. (R. p. 246; Transcript of Record 593:2-11). Mrs. Chalfant knew Carolinas Dermatology might not receive the message until the next morning. (R. p. 262; Transcript of Record 625:14-21).

Mrs. Chalfant remained concerned to the point that after leaving the voice message for Carolinas Dermatology, she asked Mr. Chalfant to go to the ER. (*See* R. p. 268; Transcript of

Record at 632:15-17). He declined. *Id.* In addition, Mrs. Chalfant discussed Mr. Chalfant's bleeding with a friend, Bob White. Mr. White told Mrs. Chalfant "go to the ER." (R. p. 271; Transcript of Record 638:16-19). Mrs. Chalfant used this in an attempt to convince Mr. Chalfant to go to the ER, but he still refused. (R. p. 271; Transcript of Record 638:19-25).

Later that evening, around 9:25 p.m., Mrs. Chalfant received a call from Ms. June "Sam" Compton. (R. p. 272; Transcript of Record 639:9-11). At this point, Mr. Chalfant had been bleeding for over two hours. (R. p. 272; Transcript of Record 639:21-23). Like Mr. White, Mrs. Compton also asked if they had considered going to the hospital. (R. p. 273; Transcript of Record 640:2-5). Mrs. Chalfant told Mrs. Compton that Mr. Chalfant refused. (R. p. 273; Transcript of Record 640:7). As Ms. Compton described it, Mrs. Chalfant was "prepared to call 9-1-1 and go to the emergency room" but "[h]er husband refused to go." (R. p. 229-230; Transcript of Record 540:24-541:8). Mrs. Compton further stated "it's kind of hard to persuade somebody when they're determined not to do something." (R. p. 229; Transcript of Record 540:8-11).

Approximately an hour after her call finished with Ms. Compton, Mr. and Mrs. Chalfant went to bed. (R. p. 273; Transcript of Record 640:16-20). He had already bled through his collared shirt onto his t-shirt. (*See* R. p. 266, 353-354; Transcript of Record 630:2-23; Exhibit P-6 (showing photos of shirts)). He removed both shirts before getting into bed. (R. p. 273; Transcript of Record 640:21-24). However, he was still bleeding such that he put a towel over his pillow. (R. p. 269-270; Transcript of Record 633:25-634:2).

Several hours later, around 3:30 a.m., Mr. Chalfant woke up, got out of his bed, and used his inhaler, which woke Mrs. Chalfant. (R. p. 274; Transcript of Record 641:17-25). Although Mr. Chalfant was still bleeding at this time, they still did not call 9-1-1 or go to the ER, and they did

not call back to Carolinas Dermatology. (*See* R. p. 275-276; Transcript of Record 642:1-12, 642:25-643:3).

Approximately an hour later at 4:30 a.m., Mr. Chalfant walked from his bed to the bathroom. (*See* R. p. 275; Transcript of Record 642:13-17). Mrs. Chalfant got up to check on him and upon turning on the light, saw that Mr. Chalfant's pillow was covered with blood, which had already been there long enough to coagulate. (R. p. 253; Transcript of Record 600:1-9). While she had not seen this previously at 3:30 a.m., (R. p. 253; Transcript of Record 600:12-14), she would have seen the blood had she turned the lights on and she probably would have taken him to the hospital then (R. p. 275; Transcript of Record 642:6-12).

Mr. Chalfant asked Mrs. Chalfant for his inhaler, which she obtained and took to Mr. Chalfant in the bathroom. (R. p. 253; Transcript of Record 600:2-5). Mr. Chalfant indicated it was the wrong one, so Mrs. Chalfant returned to the bedroom to look for another inhaler. (R. p. 253; Transcript of Record 600:5-6). She was unable to find another inhaler and returned to the bathroom where she found Mr. Chalfant unresponsive. (R. p. 253-254; Transcript of Record 600:23-601:6). Mrs. Chalfant called EMS at approximately 5:00 a.m. (R. p. 275; Transcript of Record at 642:25). Mr. Chalfant was taken by ambulance to the hospital and passed away.

I. THE TRIAL COURT PROPERLY GRANTED DIRECTED VERDICT IN RESPONDENTS' FAVOR BECAUSE APPELLANT FAILED TO ESTABLISH A MEDICAL MALPRACTICE CLAIM AND THE COMMON KNOWLEDGE EXCEPTION WAS NOT APPLICABLE

Appellant erroneously argues that the trial court should not have granted directed verdict because the common knowledge exception applied in relation to Dr. Blaskis' discharge instructions, which Appellant incorrectly describes as providing a telephone number and extension which would not connect Appellant to the Respondents' answering service.

This argument fails for a number of reasons. First, the Trial Court properly Denied Appellant's Untimely Motion to Amend the Complaint. Second, the common knowledge exception does not apply to a doctor's discharge and post-surgery instructions. Third, Appellant failed to establish that Appellant's injuries were proximately caused by the discharge instructions. Fourth, Appellant fails to establish ordinary negligence. Fifth, no reasonable juror could find that Respondents' negligence exceeded Appellant's own negligence.

a. The Common Knowledge Exception was Not Pleaded and The Trial Court Properly Granted Appellant's Untimely Motion to Amend to Allege Common Knowledge Exception as to the Discharge Instructions.

As an initial matter, Appellant's Complaint alleged only medical malpractice and failed in any way to allege the common knowledge exception. (R. p. 8-31, 292; Complaint; Transcript of Record 668:12-15). Appellant did not amend the Complaint prior to trial and the entire action was prepared and tried as a medical malpractice action. (R. p. 292; Transcript of Record 668:14-15). Appellant did not move to amend until after Respondent's arguments on Directed Verdict. (R. p. 292; Transcript of Record 668:16). The trial court properly denied Appellant's verbal motion to amend. (*See* R. p. 294; Transcript of Record 670:14-15).

The decision to amend the pleadings is within the trial court's discretion, and circumstances such as inexcusable delay and surprise to the adverse party justify a refusal to amend. *Dunbar v. Carlson*, 341 S.C. 261, 270, 533 S.E.2d 913, 918 (Ct. App. 2000). In this case, Appellant moved to amend after resting its case and after discovery had long since closed. As argued at trial, Respondents had tried the entire case based on a medical malpractice cause of action. Respondents had conducted discovery on a medical malpractice cause of action. They retained expert witnesses and questioned witnesses based on this theory. They neither expressly nor impliedly tried the case on the common knowledge exception, a theory that was not mentioned by Appellant until after Respondents' directed verdict motion. Trial is not a game of ambush, and discovery and the

discovery rules are designed to prevent trial from becoming a guessing game. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003). Appellant's attempt to change theory of liability, after the close of Appellant's case, after Appellant's medical expert had long been released from subpoena, and long after discovery was complete, was prejudicial. By moving to amend at the directed verdict stage, Appellant deprived the Respondents of discovery on the common knowledge exception, of cross examination opportunities on the issue, and of trial preparation time to address the issue. Appellant offered no explanation for the delay. [1] Further, as set forth below, amendment was properly denied as futile. As a result, the Trial Court properly denied the motion to amend.

b. The Common Knowledge Exception Does Not Apply to Dr. Blaskis' Discharge Instructions and Post-Surgical Instructions.

"As a general rule, expert testimony is required in medical malpractice actions." *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986). "In medical malpractice actions, the plaintiff must use expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Id.* at 143, 341 S.E.2d at 634. "Expert testimony is not required, however, in situations where the common knowledge or experience of laymen is extensive enough for them to

[1] To the extent the Court questions whether the trial court ruled on any of the issues raised in this paragraph or at trial, the issues would still constitute additional sustaining grounds supporting the trial court's decision. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.")

be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems." *Id.* at 142, 341 S.E.2d at 634. Even "[w]hen expert testimony is not required," though, "the plaintiff must offer evidence that rises above mere speculation or conjecture." *Melton v. Medtronic, Inc.*, 389 S.C. 641, 663, 698 S.E.2d 886, 898 (Ct. App. 2010).

Appellant erroneously argues that the common knowledge exception "applied to the discharge instructions" provided by Dr. Blaskis following Mr. Chalfant's surgery. (Appellant's Final Brief at 12). In raising this issue, Appellant relies on an interrogatory response that does not stand for the proposition for which it is cited. (*See* Appellant's Final Brief at 13 (citing Carolinas Dermatology's Answer to Plaintiff's Interrogatory No. 24)). The Interrogatory and Response reads as follows:

> State the names, addresses, and phone numbers of each person on behalf of *Carolinas Dermatology Group, P.A.* who had the duty or responsibility to establish and implement policies, procedures, rules, standing orders, and protocols for *Carolinas Dermatology Group, P.A.* had in place regarding recognition of, recognition, management, and prevention of postoperative complications on or about May 12th, 2015.Answer. Debbie Clarke and Angela Grant in care of Sweeney, Wingate, & Barrow, P.A., 1515 Lady Street, Columbia, South Carolina.

(R. p. 160-161; Transcript of Record at 354:23-355:7) (emphasis added). Stated another way, the interrogatory asks who had the duty to "establish and implement" postoperative complications policies for *the practice.* It *does not* ask who had the duty of creating and approving *individual physicians*' discharge instructions (as Appellant worked to establish at trial, and as explained below, this duty fell exclusively to the doctors). It also does not inquire regarding the practice's after-hours messaging and policy (this was also under the province of the practice's doctors).

As to the first issue, Dr. Blaskis' discharge instructions were developed solely by Dr. Blaskis in relation to his training and specialty, and they are not the province of a lay jury. Each

doctor's forms and materials are developed and created individually by each doctor (not by the practice). This is "because of [their] different training, different subspecialties." (R. p. 124; Transcript of Record 237:16-20). It is each individual doctor's training and medical board that governs the standard of care as to these forms. (R. p. 116; Transcript of Record 211:8-12). Moreover, once an individual doctor develops and creates his or her own forms, it is the *doctors* in the practice who must approve the forms, not Debbie Clarke, Angela Grant, or others who may lack medical training. (*See* R. p. 235; Transcript of Record 561:12-14). In addition to creating the forms, it is the doctors who make the decision about which forms to provide based on the procedure performed and the type of wound repair. (R. p. 203; Transcript of Record 446:22-24). In fact, Dr. Blaskis personally modified instructions by hand in certain cases, including for Mr. Chalfant. (*See* R. p. 148; Transcript of Record 328:9-11 (indicating that Dr. Blaskis crossed out instructions for care to the surgery sites because Mr. Chalfant would be seeing Doctor Carlin the next morning)).

The development and creation of the forms *includes* the selection of contact information used to provide after-hours access. Some dermatologists (e.g. Dr. Blaskis and Dr. Lang) provided an office number which takes patients to an answering machine. (*See, e.g.*, R. p. 191, 220; Transcript of Record 429:5-24, 483:4-21). Others, including Dr. Quan—another dermatologist at Carolinas Dermatology—provides a cell phone number. (*See* R. p. 142; Transcript of Record 294:9-21). Dr. Christensen, in contrast, provides a number that takes callers to an answering service rather than to his practice's office, and his patients are unable to leave a message for him. (*See* R. p. 221; Transcript of Record 484:15-25). Other doctors may use other variations, such as sometimes providing a cell instead of or in addition to an office number, providing extensions, and so on, and these practices may vary based on the specific case. (*See* R. p. 193; Transcript of Record 431:12-18). In short, because different doctors have different practices and thus different medical

risks, different availability, and different preferences within the standard of care, the development of the discharge form, including contact information, is developed, created by, and must be approved by the doctors. (*See* R. p. 124; Transcript of Record 237:16-20)

Likewise, a medical practice's after-hours process and messaging is outside the province of a lay person. As even the Appellant sought to establish at trial, it was the *doctors* in the practice who approved the after-hours practices and recordings. (*See* R. p. 231-232; Transcript of Record 550:21-551:1-6) A medical facility's after-hours recording involves vastly different considerations from, for example, a recording on a store, restaurant, or business. The rules governing a medical practice's policies "are very complicated" and the policies have to be up to the criteria of the law. (R. p. 116; Transcript of Record 211:4-7). In addition, for a medical practice, this after-hours process implicates post-treatment and post-surgical instructions and access for patients, as in this case. To the extent the after-hours process is addressed in the practices' general policies, Dr. Zhang testified that those general policies are so complex that the practice contracted with a specialist to help develop the policies. (R. p. 114, 116; Transcript of Record 198:17-23; 211:4-7). In summary, the process of determining the contents and structure of a medical practice's policies, including those regarding the contents and structure of the after-hours recording itself, is complex and involves knowledge and experience of post-surgical needs of the variety of patients seen by the practice, the requirements related to the medical practice itself, and knowledge of the specific medical services being provided. The process further involves knowledge of the standards related to the type of medical practice involved. Finally, it involves knowledge of the complex network of healthcare laws.

That this process is outside the scope of a lay person and that it varies by practice is illustrated by the different processes and messaging used by different medical practices. Dr. Lang's

practice, for example, used an answering machine that first provided an option for those seeking to cancel medical concerns and then a second option if calling with a medical concern. (*See* R. p. 191; Transcript of Record 429:5-22). Dr. Lang's practice did not, however, contain an instruction to call 9-1-1 in the event of a medical emergency. (*See* R. p. 191; Transcript of Record 429:17-22). Appellant's expert, Dr. Christensen, practiced in an office containing an instruction to call 9-1-1 in a medical emergency and connecting directly to an answering service as opposed to going to a recording. (*See* R. p. 220, 221; Transcript of Record 483:16-25, 484:15-25). Carolinas Dermatology's after-hours message provided instructions to dial 9-1-1 in the case of an emergency, options to enter specific extensions, and the option to go directly to an answering service. (*See* R. p. 307; Exhibit P-3). Dr. Zhang's practice, on the other hand, does not require his involvement in an after hours process because as a pathologist, he does not have patients who call him back. (R. p. 119; Transcript of Record 217:19-23).

Certainly, just as with many other details of a medical practice, certain aspects of both the discharge instructions and after hours recording process involved administrative processes—for example, making copies the discharge instructions or reading the after-hours script to be recorded for the answering machine. However, it is not these administrative tasks that are at issue in this case. The development, substance, and content of the discharge instructions and after hours process and messaging which are at issue were the responsibility of doctors in the practice, and as each of the medical experts in the case testified, governed by a standard of care. The development, substance, and content of the discharge instructions and after-hours process and message are issues that are not within the province of a lay person and are not subject to the common knowledge exception.

Appellant's arguments to the contrary are not supported by the record. Appellant incorrectly states that Deborah Clarke, the practice manager, was responsible for changing and recording the after-hours prompts. Rather, her role was primarily managing finance issue and human resources. (R. p. 112-113; Transcript of Record 187:24-188:5). As Ms. Clarke explicitly testified at trial, she *did not* deal with the phone system or phone company, Ironlogix. (R. p. 158; Transcript of Record 352:19-25). Likewise, Dr. Jing Zhang, the president of Carolinas Dermatology, testified that each medical procedure and the relevant standard of care is governed, not by the office manager but by each individual doctor, their training, and their medical board. (R. p. 116; Transcript of Record 211:8-12).

Further, Appellant incorrectly claims that the involvement of the office manager, Mrs. Angela Grant, indicates that the common knowledge exception should apply. Ms. Grant ran the day-to-day process of the Columbia, SC office. (R. p. 112; Transcript of Record 187:21-23). Like Ms. Clarke, Ms. Grant also has no part in determining the medical procedures or standard of care for the physicians. (R. p. 116; Transcript of Record 211:8-12).

Finally, even if the interrogatory response Appellant relies on was relevant and stood for the proposition cited by Appellant, the interrogatory response (which was part of early written discovery in the case and was further supplemented by deposition and trial testimony, including as described above) is not itself evidence in the case. (*See*, *e.g.*, Appellant's Final Brief at 13; R. p. 109-111; Transcript of Record at pp. 5-7 (demonstrating that the interrogatory response does not appear in the trial exhibits)). The interrogatory was initially mentioned while Appellant's counsel questioned Ms. Debbie Clarke but was not offered into evidence, and Appellant's counsel decided against questioning Ms. Clarke on the interrogatory response. (R. p. 157-160; Transcript of Record 351:16-354:6). Further, while Appellant's counsel later "published" the response in

advance of questioning his next witness, Lori Mauldin, Appellant's counsel then decided against calling Ms. Mauldin. (R. p. 160-161; Transcript of Record 354:19-355:11). Thus, no foundation was laid for the interrogatory, it was never used in relation to any witnesses, and it was never moved into evidence. As a result, Appellant's reliance on the interrogatory is erroneous.

c. The Trial Court Properly Found Lack of Proximate Cause.

Moreover, Appellant has critically failed to establish proximate cause. It is not enough to establish a standard of care and the defendant's failure to conform to that standard. In addition, a plaintiff must prove that the medical professional's negligence was a proximate cause of the plaintiff's injury. *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014). This applies not only in a medical malpractice cause of action but also in an ordinary negligence claim. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1997). "The touchstone of proximate cause in South Carolina is foreseeability," and "[f]oreseeability is determined by looking to the natural and probable consequences of the act complained of." *Id.* For there to be legal causation, "the accident which occurred must be the natural and probable consequence of the defendant's negligence." *Newton v. S.C. Pub. Railways Comm'n*, 319 S.C. 430, 432, 462 S.E.2d 266, 267 (1995). Thus, in *Newton*, the Supreme Court found that the superseding negligence of another was not chargeable to the defendant. *Id.* "One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act." *Crolley v. Hutchins*, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989). "Foreseeability is to be judged from the perspective of the defendant at the time of the negligent act, not after the injury has occurred." *Id.*

In the present case, as to proximate cause, the trial court properly found as follows:

> Incredible and uncontroverted testimony is that [Mr. Chalfant's] wife tried to convince him to go to the ER, but he refused to do so. Wife's close friends, Ms. Sam Compton, at 9:25PM, and Mr. Bob White at 7:43PM, testified that, in separate phone calls some time prior to 10:00PM, wife wanted the decedent to seek help at the ER, but he refused to do so.

(R. p. 303; Transcript of Record 712:9-14). This is fully born out by the record. It is undisputed in this case that had Mr. Chalfant called 9-1-1 or gone to a medical provider, more likely than not his bleeding would have been stopped. It was Mr. Chalfant who refused to call 9-1-1 or to go to an Emergency Room, despite his knowledge of the bleeding risk related to his surgery, his own knowledge of the extent of his bleeding over 10 hours, the instructions from Carolinas Dermatology's after-hours message to call 9-1-1 in the event of an emergency, and the admonitions of his wife and two friends to go to the emergency room. The record lacks any testimony or evidence whatsoever that *Mr. Chalfant* would have gone to the emergency room in any situation. Thus, not only was there no evidence of causation in fact, but there was also no evidence of legal cause.

Mr. Chalfant entered surgery knowing that bleeding was a risk. As even Appellant's expert, Dr. Christensen noted, it was clear that Mr. Chalfant was informed regarding bleeding prior to surgery, and the informed consent as "totally adequate." (R. p. 208; Transcript of Record 455:13-15). In addition, Mrs. Chalfant specifically recalled that bleeding was of the "listed concerns… that could occur." (R. p. 238-239; Transcript of Record 581:22-582:7). In addition, following her interview with Mrs. Chalfant following Mr. Chalfant's death, the deputy coroner Ann Neeley recorded in her notes that Dr. Blaskis had performed the procedures and that "[t]hey were instructed to call the office if they noted any bleeding from the sites." (R. p. 173-174; Transcript of Record 381:2-382-13).

Mr. Chalfant became aware that he was experiencing bleeding within hours of returning home from surgery. By 6:30 or 7:00 p.m., the bleeding was sufficient that Mrs. Chalfant was able to see it and observe it was coming out of the bandage. (R. p. 259; Transcript of Record 622:7-9). Mrs. Chalfant gave Mr. Chalfant a paper towel at that time, and then continued to provide paper towels throughout the evening. (R. p. 260; Transcript of Record 623:9-13). She also provided him with medical gauze. (R. p. 264-265; Transcript of Record 627:20-628:11, 628:19-22). He continued using paper towels and gauze throughout the evening and into the night, but these were insufficient to prevent the blood from puddling and from saturating his clothing, going through his dress shirt to his undershirt. (R. p. 172, 266, 267; Transcript of Record 379:20-24, 630:13-23, 631:20-24).

By 7:10 p.m. that evening, Mr. Chalfant's bleeding was already sufficiently concerning, so she called Carolinas Dermatology which she knew was closed. (R. p. 260, 265; Transcript of Record 623:17-21, 628:13-17). She reached the after-hours recording which states:

> 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. 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.

(R. p. 307; Exhibit P-3). Instead of dialing the answering service, Mrs. Chalfant dialed the extension, reached a second recording, and left a message. (R. p. 246; Transcript of Record 593:2-14). Mrs. Chalfant knew Carolinas Dermatology might not receive the message until the next morning. (R. p. 262; Transcript of Record 625:14-21).

Even after leaving this message, Mrs. Chalfant remained so concerned that she asked Mr. Chalfant to go to the *emergency* room. (R. p. 268; Transcript of Record at 632:15-17). He declined. *Id.* In addition, Mrs. Chalfant had multiple phone conversations with friends regarding her

concerns. At one point, she discussed Mr. Chalfant's bleeding with a friend, Bob White. Mr. White told Mrs. Chalfant "go to the ER." (R. p. 271; Transcript of Record 638:16-19). Mrs. Chalfant used this in an attempt to convince Mr. Chalfant to go to the emergency room, but he still refused. (R. p. 271; Transcript of Record 638:19-25).

Later that evening, around 9:25 p.m., Mrs. Chalfant talked with Ms. June "Sam" Compton. (R. p. 272; Transcript of Record 639:9-11). At this point, Mr. Chalfant had been bleeding for over two hours. (R. p. 272; Transcript of Record 639:21-23). Like Mr. White, Mrs. Compton also asked if they had considered going to the hospital. (R. p. 273; Transcript of Record 640:2-5). Mrs. Chalfant told Mrs. Compton that Mr. Chalfant refused. (R. p. 273; Transcript of Record 640:7). As Ms. Compton described it, Mrs. Chalfant was "prepared to call 9-1-1- and go to the emergency room" but "[h]er husband refused to go." (R. p. 229-230; Transcript of Record 540:24-541:8). Mrs. Compton further stated "it's kind of hard to persuade somebody when they're determined not to do something." (R. p. 229; Transcript of Record 540:8-11).

Approximately an hour after her call finished with Ms. Compton, Mr. and Mrs. Chalfant went to bed. (R. p. 273; Transcript of Record 640:16-20). He had already bled through his collared shirt and onto his t-shirt, which Mr. Chalfant knew because he removed both shirts before getting into bed. (*See* R. p. 266, 273, 353-354; Transcript of Record 630:2-23, 640:21-24; Exhibit P-6 (showing photos of clothing)). Moreover, his bleeding continued to the extent that he put a towel over his pillow. (R. p. 269-270; Transcript of Record 633:25-634:2).

Several hours later, around 3:30 a.m., Mr. Chalfant woke up, got out of his bed, and used his inhaler, which woke Mrs. Chalfant. (R. p. 274; Transcript of Record 641:17-25). At this point in time, Mr. Chalfant had been bleeding nearly 9 hours or more. According to the pathologist, Mr. Chalfant's bed contained easily two, and maybe three "Coke" cans worth of blood. (R. p. 170;

Transcript of Record 374:21-24). When Mr. Chalfant got up at 3:30 a.m., Mrs. Chalfant would have seen much of this blood had they turned on the lights. (R. p. 275; Transcript of Record 642:1-12). Thus, although Mr. Chalfant was still bleeding at this time, they still did not call 9-1-1 or go to the ER, and they did not call back to Carolinas Dermatology's answering service. (*See* R. p. 275-276; Transcript of Record 642:1-12, 642:25-643:3).

In summary, the Chalfants knew bleeding was a risk of surgery. Mr. Chalfant experienced bleeding shortly after arriving home, and nearly as soon as Mrs. Chalfant realized he was bleeding, she became concerned enough to call the doctor's office, where one of the first instructions she heard was to call 9-1-1 in the case of a true emergency. It is uncontested that after she left a message, she attempted to convince Mr. Chalfant to go to the *emergency* room. He refused. She remained so concerned that she spoke to two friends, one who told her "go to the ER." She used this to again attempt to get Mr. Chalfant to go to the emergency room. The record unquestionably shows that she was prepared to take him to the emergency room and to call 9-1-1 that night, and would have but for her husband's refusal. It is unquestioned that the Chalfants had instructions to call 9-1-1 in the case of an emergency, that Mrs. Chalfant was ready and trying to take him to the emergency room, and that at least two friends communicated this was an emergency.

That Mr. Chalfant could bleed out from Mohs surgery to his ear without contacting medical help was not foreseeable in the course of ordinary care. In 36 years and with over 20,000 patients treated, Dr. Blaskis had never had a patient present with a problem in relation to his postoperative instructions or the after-hours recording. (*See* R. p. 129, 131; Transcript of Record at 270:6-11; 272:15-17). In addition, to Dr. Blaskis' knowledge, there has never been another death from bleeding in a Mohs surgery case in this history of Mohs surgery, which dates back to the 1930s. (*See* R. p. 143; Transcript of Record 301:5-10). In fact, Amy Durso, the forensic pathologist who

performed Mr. Chalfant's autopsy, testified that while she performs approximately 250 autopsies a year, she has never had someone bleed to death from a wound in the ear. (*See* R. p. 167; Transcript of Record 367:17-18). Mr. Chalfant's injury was not foreseeable.

Nor was Mr. Chalfant's injury foreseeable in light of the instructions that were provided. Dr. Blaskis' provided an office phone number, a recording that instructed Mrs. Chalfant instructions to dial 9-1-1 in an emergency, and an instruction on how to reach the answering service. As Dr. Lang testified, if a patient tried to reach the doctor without success, he would expect them to try again. (*See* R. p. 202; Transcript of Record 440:4-8). If the patient was still not able to reach the doctor, he would expect a patient experiencing constant bleeding to go to an emergency room or, in the case of severe bleeding, to call 9-1-1. (*See* R. p. 202; Transcript of Record 440:12-20).

Likewise, Appellant's expert Dr. Christensen indicated that when his patients call his number after hours, he expects them to listen to the message. (*See* R. p. 222; Transcript of Record 485:13-15). He testified that if one of his patients was experiencing bleeding like Mr. Chalfant's and was unable to reach the doctor, he would expect them to call 9-1-1 or present to an emergency room or urgent care facility. (R. p. 225; Transcript of Record 488:5-11). He also indicated that had Mrs. Chalfant listened to Carolinas Dermatology's entire after-hours message (as he previously indicated he would expect a patient to do), she would have reached the answering service, which would have called the on-call doctor, and appropriate medical care could have been given. (*See* R. p. 222, 225-226; Transcript of Record 485:13-15; 488:23-489:8).

Only one reasonable inference can be deduced from the evidence, which is that Dr. Blaskis was not the proximate cause of Mr. Chalfant's death. Mr. Chalfant knew of the risk of bleeding. The Chalfants were informed to call 9-1-1 in the case of an emergency. They were informed by

their circumstances and independent parties that they were in an emergency. Had they dialed 9-1-1 or gone to an emergency room, Mr. Chalfant would have survived. Yet Mr. Chalfant refused, despite his knowledge of his condition, his knowledge of the risks of his surgery, and the instructions from family and friends. Not only was Dr. Blaskis not the cause in fact of Mr. Chalfant's injuries, but Respondents could not have foreseen this course of events in the exercise of ordinary care. Mr. Chalfant's injuries in light of the record were not the natural and probable cause of Respondents' actions.

In light of this evidence, the Trial Court properly found that Dr. Blaskis and Carolinas Dermatology were not the proximate cause of Mr. Chalfant's injuries.

d. As an Additional Sustaining Ground, Appellant Fails to Establish Even Ordinary Negligence.

Even if the common knowledge exception applied, Appellant lacks any evidence that, under an ordinary negligence standard, the instructions breached the standard of care. Under an ordinary negligence standard, a plaintiff must still prove that the defendant owed plaintiff a duty, that the defendant breached that duty, and that the breach caused plaintiff's damages.

As to duty, Appellant relies on Dr. Lang's testimony that "a physician has a duty to provide a clear method, a reasonable method for a patient to reach the physician after hours regarding complications, such as bleeding." (Appellant's Final Brief at 24). While he also testified regarding different variations in how an after hours message might be set up, he testified that these variations *were not* the standard of care. (*See* Appellant's Final Brief at 24; R. p. 192-193; Transcript of Record 430:23-431:2 (testifying that while it may be preferable to have an answering service as the first option, having a message system set up to get to the answering service is also acceptable)). As a result, there was no duty to abide by one of these variations.

Regarding breach, Appellant relies on Dr. Christensen's concerns with the instruction to dial the extension. (Appellant's Final Brief at 25).

Finally, as to proximate cause, Appellant states that had Appellant been able to contact Dr. Blaskis on May 12, 2015, he would not have died. (Appellant's Final Brief at 26). Appellant argues that by following the discharge instructions exactly, Appellant was not able to get the help Mr. Chalfant needed, resulting in his death. *Id.*

Under the ordinary negligence framework suggested by Appellant, directed verdict would still have been appropriate. As set forth above, Appellant alleges that Dr. Blaskis had a duty to provide a clear and reasonable method for the patient to reach the physician after hours. Dr. Blaskis provided the office number, as discussed above, and that number took the caller to instructions (1) to call 9-1-1 in the case of an emergency and (2) to dial 9 to reach the answering service. As described by Dr. Lang, who Appellant relies on for the standard of care, Dr. Lang testified that Carolinas Dermatology's after hours message was a "very good message," that it was "easy to follow," and that there "wasn't anything complicated about it." (R. p. 192-193; Transcript of Record 430:23-431:2). He testified "it made it very clear how you could get to a real person." (R. p. 193; Transcript of Record 431:4-5).

Likewise, Appellant's expert, Dr. Christensen, would have expected patients to listen to the message providing instructions on how to reach a real person. (*see* R. p. 222; Transcript of Record 485:9-15). The undisputed testimony further indicates that had Mrs. Chalfant listened to the message and followed the instructions to reach the answering service, Mr. Chalfant would not have passed away that night. (R. p. 225-226; Transcript of Record 488:23-489:8). Likewise, had she dialed 9-1-1 as instructed by the message, Mr. Chalfant would not have passed away.

As a result, the undisputed testimony is that Appellants were provided with written and recorded instructions which, had they been followed, would have prevented Mr. Chalfant's injury. Thus, there was no breach.

In addition, as discussed at length above in Section I.c., Appellant failed to establish proximate cause, and this analysis applies equally to the ordinary negligence analysis.

As a result, Appellant failed to establish even ordinary negligence, and directed verdict was appropriate.

e. As an Additional Sustaining Ground, No Reasonable Juror Could Find that Respondents' Negligence Surpassed Appellant's Negligence.

As to the issue of comparative negligence, a trial judge should enter "judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). "[A] court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Id*. at 423, 529 S.E.2d at 713. As in *Bloom*, a verdict for the Appellant in this case is not reasonably possible under the facts.

As set forth in Section I.c. above addressing proximate cause, the evidence, even when viewed in a light most favorable to the Appellant, show that the Appellant was negligent, and that Appellant's negligence exceeded any alleged negligence by Respondents. As a result, for the same reasons that there was no proximate cause, the only reasonable inference from the evidence is that Appellant's negligence exceeded fifty percent.

II. THE TRIAL COURT PROPERLY GRANTED DIRECTED VERDICT IN RESPONDENTS' FAVOR BECAUSE THERE WAS NO CONFLICTING EVIDENCE REGARDING BREACH OF THE STANDARD OF CARE RELATED TO POST SURGERY INSTRUCTIONS

a. Appellant Failed to Establish Expert Testimony that Dr. Blaskis Breached the Standard of Care.

As already set forth above, "[a]s a general rule, expert testimony is required in medical malpractice actions." *Pederson*, 288 S.C. at 142, 341 S.E.2d at 634. "In medical malpractice actions, the plaintiff must use expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Id.* at 143, 341 S.E.2d at 634. "Expert testimony is not required, however, in situations where the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems." *Id.* at 142, 341 S.E.2d at 634. Even "[w]hen expert testimony is not required," though, "the plaintiff must offer evidence that rises above mere speculation or conjecture." *Melton*, 389 S.C. at 663, 698 S.E.2d at 898.

Directed verdict was appropriate in this case because Appellant failed to establish expert testimony that Dr. Blaskis breached the standard of care. As to the issue of post-surgical instructions, which Appellant addresses in Section II of Appellant's Brief, both Appellant's and Respondents' experts testified on this issue. As conceded by the Appellant, Appellant's expert, Dr. Christensen, *could not testify* that Dr. Blaskis breached the standard of care. (Appellant's Final Brief at 29).

Likewise, Dr. Pearon Lang, who was called and offered as an expert by Appellant's case in chief, was asked and testified unequivocally that he did not believe that Dr. Blaskis breached "any" standard of care in this case. (R. p. 187; Transcript of Record at 424:10-12). As to the risks of bleeding specifically, Dr. Lang testified that the risks were "clearly outlined in the operative permit that Mr. Chalfant signed prior to the surgery." (R. p. 187-188; Transcript of Record at 424:22-425:3).

As a result, Appellant was unable to establish through expert testimony the defendant's failure to conform to the standard of care. *Pederson*, 288 S.C. at 143, 341 S.E.2d at 634. Thus, directed verdict was appropriate.

b. Appellant Failed to Establish Proximate Cause.

For the same reasons discussed in Section I.c. above, Appellant has likewise failed to establish proximate cause as to Section II. Because proximate cause is a required element to prove medical and ordinary negligence, directed verdict was properly granted.

III. THE TRIAL COURT PROPERLY GRANTED DIRECTED VERDICT IN RESPONDENTS' FAVOR BECAUSE EXPERT TESTIMONY CREATED NO QUESTION OF FACT REGARDING BREACH OF THE STANDARD OF CARE AS TO CONTRAINDICATIONS REGARDING TACHYCARDIA AND BECAUSE APPELLANT SHOWED NO RELATED CAUSATION.

Appellant erroneously argues (1) that there was a question of fact at trial as to the issue of whether Mr. Chalfant's heart rate was a contraindication to Mohs surgery and (2) that this question of fact demonstrates that the trial court improperly granted directed verdict. As set forth below, however, there was no conflicting testimony at trial and further, even if conflicting testimony existed, Mr. Chalfant's heart rate had no bearing on his death, such that directed verdict was appropriate.

a. Dr. Lang's Testimony Created No Conflict Regarding Dr. Blaskis' Treatment of Mr. Chalfant.

Appellant's arguments on this issue arise in relation to Dr. Pearon Lang's trial testimony regarding Mr. Chalfant's heart condition. Dr. Lang is board certified in dermatology and dermatopahtology and is a Mohs fellow. (R. p. 176; Transcript of Record 406:3-18). At trial, Appellant tendered Dr. Lang as an expert in dermatology and Mohs surgery. (R. p. 176; Transcript of Record 406:3-18). He had previously served for 30 years on the faculty at MUSC where he specialized in Mohs surgery and dermatological surgery, heading up the dermatology department. (R. p. 186; Transcript of Record 423:11-17).

Dr. Lang testified at trial regarding Mr. Chalfant's heart rate, which was 116 on the date of his surgery. (R. p. 178; Transcript of Record 410:11-16). While this heart rate is considered to be "tachycardia," it is not necessarily a contraindication to surgery, and it was not a contraindication in this case. (*See* R. p. 178, 186-187; Transcript of Record 410:17-21, 423:24-424:21). Dr. Lang testified at trial that based on the medical records available, he believed that while Mr. Chalfant had tachycardia, it was not an abnormal heart rate for Mr. Chalfant because multiple records showed that Mr. Chalfant's heartrate was normally elevated. (R. p. 186-187; Transcript of Record 423:24-424:21). Dr. Lang testified that even with tachycardia, a person should proceed to Mohs surgery if they're within their baseline heart rate. (*See* R. p. 195; Transcript of Record 433:6-9). Dr. Lang walked the trial court through six different records showing Mr. Chalfant's heart rate at various points in time, indicating that Mr. Chalfant's baseline heart rate was over a hundred beats per minute. (R. p. 195-197; Transcript of Record 433:10-435:6). Thus, with this information in-hand, Dr. Lang determined that a heart rate of 116 was within his baseline heart rate, and it was appropriate for Dr. Blaskis to proceed with the surgery on May 12, 2015. (*See* R. p. 179, 199-200; Transcript of Record 411:9; 437:21-438:11).

In light of this testimony, Dr. Lang was confronted with prior deposition testimony wherein Dr. Lang had testified that he, personally, would not have performed the Mohs surgery that day if the patient had a heartrate exceeding 100 beats per minute. (*See* R. p. 180-181; Transcript of Record 412:20-413:10). Dr. Lang was also asked about his testimony that if an individual was tachycardic with a heart rate over 80 or 85, he would not have performed the Mohs surgery, but rather that he would require the patient to be assessed. (*See* R. p. 183; Transcript of Record 415:2-11). Dr. Lang indicated that at the time, he did not have access to records showing that Mr. Chalfant regularly had a heartbeat over 100, indicating that his baseline was over 100 beats per minute. (*See* R. p. 178-179, 181; Transcript of Record 410:25-411:14, 413:11-19).

Whether this issue created a conflict requiring the case to go to the jury was addressed directly by the trial court, which found as follows:

> Plaintiff advances the theory that the revision of [Dr. Lang's] testimony creates a conflict in testimony before the Court, and, therefore, a question of fact for the jury. But the Court finds there is but one opinion by the witness albeit a revised one.
>
> This Court noted and highlighted his testimony to be considering -- to be considered after Doctor Stahl's medical records. The risk of an elevated heart rate was minimal, and this Court noted the foundational and crucial question of whether or not Defendant doctor deviated from the standard of care was not asked by the Plaintiff. In fact, the record before this Court shows his testimony opined that Defendant doctor did not breach the standard of care duty.

(*See* R. p. 300; Transcript of Record 709:7-19).

Moreover, even had Dr. Lang's deposition testimony remained unchanged by his review of Dr. Stahl's records, the deposition testimony—which concerned only his personal standard—could not have established a breach of the standard of care by Respondents. As with Sections I and II above, expert testimony is required to establish both (1) the standard of care and (2) the defendant's failure to conform to that standard. *Pederson*, 288 S.C. at 143, 341 S.E.2d at 634. "[I]f the expert merely testifies as to his own *personal* standard of care, rather than the generally

recognized and accepted standard of care, such testimony is insufficient to survive summary judgment." *Melton*, 389 S.C. at 655, 698 S.E.2d at 893. *See also Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 57, 677 S.E.2d 32, 38 (Ct. App. 2009) (finding that even where expert testified that physician testified from the expert's personal standard of care, such evidence was not sufficient because it did not show that the physician deviated from the **"generally accepted standard of care"** (emphasis in original)).

While Dr. Lang's deposition testimony indicated that *he, personally*, would not have proceeded with the surgery based on the information he then had available, this is insufficient to show that Dr. Blaskis deviated from the generally accepted standard of care. Rather, the deposition testimony, at best, described Dr. Lang's personal standard of care, which Dr. Lang was later able to revise when presented more information. As a result, even absent Dr. Lang's revision in light of the medical records, his deposition testimony created no conflict or question of fact.

For these reasons, the Court should affirm the trial court's grant of directed verdict.

b. It is Uncontested that Tachycardia Played No Role in Mr. Chalfant's Death.

Moreover, even if a question of fact existed as to whether tachycardia was a contraindication for surgery, it does not present a material question of fact to defeat directed verdict because it is uncontested that tachycardia has no bearing whatsoever on Mr. Chalfant's death. As Appellant notes, 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. (Appellant's Final Brief at 12, R. p. 171; 510-514; Transcript 377:14-17; Exhibit P-18). Further, as Appellant conceded in the directed verdict argument at trial, "Tachycardia did not cause his death." (R. p. 295; Transcript of Record 691:13-15). "Doctor Durso was—could not have been clearer that the cause of death was bleeding to death." (R. p. 295; Transcript of Record 691:14-15).

As a result, whether or not tachycardia was a contraindication for surgery has no bearing on liability in this case. Dr. Blaskis says he evaluated Mr. Chalfant in light of his heart rate and found that he was an appropriate candidate for surgery. However, even if Dr. Blaskis had not evaluated Mr. Chalfant, it is uncontested that Mr. Chalfant's heart rate was not the cause of his death. Mr. Chalfant could have been seen by a heart specialist that day, and because his heart rate was normal and not a contraindication, Dr. Blaskis would have proceeded and nothing would have changed. Thus, even had tachycardia initially been considered as a possible contraindication, it was not *in* fact a contraindication and further was not causative of Appellant's injuries. Thus, it creates no material question of fact, and directed verdict was proper.

CONCLUSION

In summary, the trial court properly granted directed verdict to Respondents as found by the trial court and for all the reasons set forth above. As a result, Respondents request that the Court AFFIRM the trial court's ruling and dismiss Appellant's appeal.

November 3, 2020

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