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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2022-000740
Case No. 2016-CP-24-0157

Tony Young, ... Petitioner,

v.

Greenwood County Detention Center and the Greenwood County Sheriff's Office, ... Defendants,

Of which, the Greenwood County Sheriff's Office is .... Respondent.

BRIEF OF RESPONDENT

Andrew F. Lindemann
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Russell W. Harter, Jr.
CHAPMAN HARTER, P.A.
14 Lavinia Avenue
Post Office Box 10224
Greenville, South Carolina 29603
(864) 233-4500

Counsel for Respondent

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Standard of Review 4

Arguments 5

I. The Petitioner is mistaken in his position that the right to a trial by jury against the Respondent Greenwood County Sheriff's Office is protected by the Seventh Amendment of the United States Constitution and Article I, § 14 of the South Carolina Constitution 5

II. The Petitioner failed to show that he was denied a fair trial based upon the trial judge's rulings on evidentiary issues 8

A. Basic Principles of Law 8

B. Issue Preservation 11

C. Evidence of Impartiality or Impropriety by the Trial Judge 18

D. Improper and Objectionable Statement Purportedly Made to Petitioner's Counsel by Unidentified Juror 20

E. Lack of Prejudice 23

F. Curative Instructions 24

III. The trial court properly charged the defense of comparative negligence and the definition of "gross negligence." 26

Conclusion 30

TABLE OF AUTHORITIES

Cases

Aakjer v. Spagnoli,
291 S.C. 165, 352 S.E.2d 503 (Ct. App. 1987) 8, 9

Branham v. Ford Motor Co.,
390 S.C. 203, 701 S.E.2d 5 (2010) 9

Brinkley v. South Carolina Department of Corrections,
386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009) 4

Buff v. South Carolina Dept. of Transportation,
342 S.C. 416, 537 S.E.2d 279 (2000) 25

Cole v. Raut,
378 S.C. 398, 663 S.E.2d 30 (2008) 4, 27

Cone v. Nettles,
308 S.C. 109, 417 S.E.2d 523 (1992) 7

Edwards v. Lexington County Sheriff's Department,
386 S.C. 285, 688 S.E.2d 125 (2010) 7

Elam v. South Carolina Dept. of Transportation,
361 S.C. 9, 602 S.E.2d 772 (2004) 13

Ellie, Inc. v. Miccichi,
358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 13

Hodges v. Rainey,
341 S.C. 79, 533 S.E.2d 578 (2000) 7

I'On v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000) 13

Lampley v. Hulon,
432 S.C. 566, 854 S.E.2d 489 (Ct. App. 2021) 7

Lipscomb v. Poole,
247 S.C. 425, 147 S.E.2d 692 (1966)... 11

Liteky v. United States,
510 U.S. 540 (1994)... 10

McDonald v. City of Chicago,
130 S.Ct. 3020 (2010)... 6

McKissick v. J.F. Cleckley & Co.,
325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996) 16

Parks v. Morris Homes Corp.,
245 S.C. 461, 141 S.E.2d 129 (1965)... 11

Pelfrey v. Bank of Greer,
270 S.C. 691, 244 S.E.2d 315 (1978)... 5, 6

R.J. Reynolds Tobacco Co. v. Shewry,
423 F.3d 906 (9th Cir. 2005) 6

Shumpert v. State,
378 S.C. 62, 661 S.E.2d 369 (2008)... 22

Smoak v. Seaboard Coast Line Railroad Co.,
259 S.C. 632, 193 S.E.2d 594 (1972)... 9

State v. DeBerry,
250 S.C. 314, 157 S.E.2d 637 (1967)... 10

State v. Galbreath,
359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004) 24

State v. Pace,
316 S.C. 71, 447 S.E.2d 186 (1994).. 9, 17

State v. Thomason,
355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003) 12

State v. Ziegler,
364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) 21

Stephens v. CSX Transportation,
415 S.C. 182, 781 S.E.2d 534 (2015).. 26

Unisys Corp. v. South Carolina Budget & Control Board,
346 S.C. 158, 551 S.E.2d 263 (2001).. 6

Verenes v. Alvanos,
387 S.C. 11, 690 S.E.2d 771 (2010)... 4

Wachovia Bank v. Blackburn,
394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011) 5

Rules, Statutes, and Other Authorities

Rule 38(a), SCRCP 7, 8

Rule 606(b), SCRE 21

Rule 611(a), SCRE.. 10

S.C. Const. Art. I, § 14... 5, 6, 7

STATEMENT OF THE CASE

The Petitioner Tony Young was involved in a motor vehicle accident on August 10, 2011, resulting in bodily injuries. The Petitioner was charged with Felony Driving Under the Influence. Following the accident, he was taken to Greenville Memorial Hospital where he was treated and later discharged on August 16, 2011. He was discharged to the South Carolina Highway Patrol and was transported by a trooper to the Greenwood County Detention Center, which was operated by the Respondent Greenwood County Sheriff's Office.

The Petitioner was booked at the Detention Center on August 16, 2011. He alleges that for the initial six days in which he was in custody he was denied pain medication and his neck brace. Those allegations are denied. At trial, there was testimony that the Petitioner's neck brace was removed for purposes of his booking photograph and to check for contraband, but the brace was returned to him shortly thereafter. (App. 607-611). There was also evidence that the Petitioner was not denied pain medication. On the date of his booking, he was prescribed by the medical contractor, Southern Health Partners, with Ibuprofen which was an appropriate substitute for the Lortab that had been prescribed at the hospital. (App. 298-304).

On July 10, 2013, the Petitioner filed this action in the Court of Common Pleas for Greenwood County alleging state and federal claims. On August 12,

2013, the Defendants removed this action to the United States District Court for the District of South Carolina. The United States District Court granted Defendants' motion for summary judgment as to the claims brought pursuant to 42 U.S.C. § 1983 and declined to exercise supplemental jurisdiction over the state law claims thereby remanding those claims to the state court. (App. 1065-1066). The remaining state law claims were tried before Circuit Court Judge Frank Addy, Jr. and a jury from September 24, 2018 through September 27, 2018.

At the end of the four-day trial, the jury returned a verdict in favor of the defense, finding that the Respondent was not grossly negligent in regard to the duty to provide access to reasonable and necessary medical care and treatment to the Petitioner while he was incarcerated at the Greenwood County Detention Center. (App. 714). The Petitioner subsequently filed post-trial motions on October 5, 2018. Those motions were vague, unsupported by any specific evidence or objections, and failed to cite any law. (App. 60-61). Judge Addy denied those post-trial motions by Order dated March 27, 2019. (App. 8). The trial judge found that the "Plaintiff and Defendants presented conflicting evidence on the issue of gross negligence, and the jury simply found that the Plaintiff had not met his burden of proving the Defendant acted negligently in providing medical care to the plaintiff. In light of the contested nature of the testimony and

out of due respect and deference to the findings of the trier of fact, the court declines to grant the Plaintiff's motion for a new trial." (App. 8).

The Petitioner filed an appeal to the South Carolina Court of Appeals. The Court of Appeals affirmed the trial court by an unpublished opinion filed April 6, 2022. (App. 1139-1143). The Petitioner then filed a petition for rehearing which was denied by Order filed May 3, 2022. (App. 1149).

The Petitioner then sought a writ of certiorari from this Court. By Order filed May 17, 2023, the petition for writ of certiorari was granted as to Question I and denied as to the remaining question.

STANDARD OF REVIEW

The issues raised on appeal are governed by an abuse of discretion standard of review. Specifically, as the Court of Appeals has explained, "[t]he grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. South Carolina Department of Corrections*, 386 S.C. 182, 687 S.E.2d 54, 56 (Ct. App. 2009).

Furthermore, as this Court has held, whether a party has a constitutional or statutory right to a trial by jury presents a question of law. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771, 772 (2010). The standard of review for questions of law is *de novo*.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Id.*

ARGUMENTS

I. The Petitioner is mistaken in his position that the right to a trial by jury against the Respondent Greenwood County Sheriff's Office is protected by the Seventh Amendment of the United States Constitution and Article I, § 14 of the South Carolina Constitution.

The focus of the Petitioner's argument on certiorari is that comments made by the trial judge in ruling on evidentiary issues violated his right to a trial by jury as protected under the Seventh Amendment of the United States Constitution and Article I, § 14 of the South Carolina Constitution. The Petitioner, however, is not guaranteed a right to a trial by jury under either constitution, and as a result, the actions of the alleged conduct by the trial judge did not violate a constitutionally-protected right to a trial by jury.

As to the United States Constitution, the Seventh Amendment right to a jury trial in civil cases has never been held applicable to the States by the doctrine of incorporation under the Fourteenth Amendment. In *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978), this Court recognized that "the Seventh Amendment to the United States Constitution, which governs right to trial by jury in Federal courts, … has never been held applicable to the States." 244 S.E.2d at 316. *See also*, *Wachovia Bank v. Blackburn*, 394 S.C. 579, 716 S.E.2d 454, 457 (Ct. App. 2011) ("while the [defendants] rely on federal case law in their brief, a parties' right to a jury trial in South Carolina is governed by state law"). In

McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), the United States Supreme Court identified "the Seventh Amendment right to a jury trial in civil cases" as one of the "only rights not fully incorporated" against the states. 130 S.Ct. at 3035, n.13. *See also*, *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 924 (9th Cir. 2005) ("the Seventh Amendment's guarantee of the right to a civil trial by jury does not apply to the states and was not incorporated into the Fourteenth Amendment"). Therefore, the Petitioner's reliance on the Seventh Amendment, and case law applying that amendment, is misplaced. The Petitioner cannot claim any violation of his Seventh Amendment rights.

As to the South Carolina Constitution, this Court in *Pelfrey supra*, further explained that Article I, § 14 of the South Carolina Constitution, which preserves the "right to trial by jury inviolate," has been interpreted "to mean that right of jury trial shall be preserved only in those cases in which the parties were entitled to it under the law or practice existing at the time of the constitution." *Pelfrey*, 244 S.E.2d at 316. In *Unisys Corp. v. South Carolina Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001), this Court reaffirmed that there is no constitutional right to a jury trial in an action against the sovereign not recognized at the time the 1868 constitution was adopted. Specifically, this Court explained that "art. I, § 14 secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868." 551 S.E.2d at 271.

This Court expressly recognized that "at the time our constitution was adopted in 1868, the State was immune from suit on a contract." *Id*. This Court thus concluded that the South Carolina Constitution "does not guarantee the right to a jury trial on a contract with the State." *Id*.

In 1868, there existed no right of action or remedy recoverable against the sovereign under any circumstances or scenarios. Absolute sovereign immunity existed for the State and its political subdivisions. *See*, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 584 (2000) (observing that in 1934 "the State was protected by total sovereign immunity and could be sued in tort or contract only when the State consented").[1]

Therefore, the Petitioner is again mistaken in his position that Article I, § 14 of the South Carolina Constitution guarantees his right to a jury trial in this action. Likewise, the Petitioner is mistaken in his position that the South Carolina Tort Claims Act provides a right to a jury trial. The Petitioner does not cite any provision of the Tort Claims Act that explicitly grants a right to a jury trial. Moreover, the Plaintiff is mistaken in his position that Rule 38, SCRCP, grants a right to a jury trial in the absence of that right being bestowed by constitutional provision or by statute. Rule 38(a), in fact, states: "The right of trial by jury as

[1] Under South Carolina law, a sheriff is a state official. *See*, *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992); *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010); *Lampley v. Hulon*, 432 S.C. 566, 854 S.E.2d 489 (Ct. App. 2021).

declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate." Rule 38(a), SCRCP. Thus, Rule 38(a) does not create any rights but rather by its very language is applicable to the right to jury trial only where bestowed by constitutional provision or by statute.

In sum, to the extent that the Petitioner is seeking a new trial on the premise that comments made by the trial judge in ruling on evidentiary issues violated his constitutional or statutory right to a trial by jury, that position is legally erroneous and should be rejected.

II. The Petitioner failed to show that he was denied a fair trial based upon the trial judge's rulings on evidentiary issues.

The Petitioner contends on appeal that he was denied a fair trial based upon the trial judge's comments in ruling on certain evidentiary issues and in generally controlling the presentation of such evidence. The Court of Appeals was correct in rejecting the Petitioner's argument that he was denied a fair trial. (App. 1140-1141).

A. <u>Basic Principles of Law</u>

From the outset, there are several elementary principles of law that establish the framework for this analysis. It is well settled that "[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials." *Aakjer v.*

Spagnoli, 291 S.C. 165, 352 S.E.2d 503, 511 (Ct. App. 1987). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." *Id*. Moreover, "[p]erfection in human behavior is an unrealistic expectation. This principle applies as well to trial judges as it does to lesser mortals." *Id*. (Citation omitted). Similarly, in *Smoak v. Seaboard Coast Line Railroad Co.*, 259 S.C. 632, 193 S.E.2d 594 (1972), this Court observed:

> The defendant is not entitled to a perfect trial, but only a fair trial. Hardly any case is completed without some flaw. If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged. Our Court has held many times that such matters are basically for the sound discretion of the trial judge.

193 S.E.2d at 598.

Nonetheless, it is also true that a "trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186, 187 (1994). Accordingly, a trial judge should refrain from remarks that "impugn the credibility of counsel" and "diminish him … in the eyes of the jury." *Id*. "Reference by a trial judge to an attorney's age, gender, or competence [is] improper." *Id*.

At the same time, a trial judge has the "inherent authority to manage and conduct a trial." *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5, 26 (2010). This Court has long recognized that "[a] trial judge is vested with a wide

discretion in the conduct of a trial. He has the duty to see that the trial proceeds in an orderly fashion and should prevent unnecessary repetition, working to the end that the time of the court be preserved." *State v. DeBerry*, 250 S.C. 314, 157 S.E.2d 637, 641 (1967). As to the presentation of evidence, Rule 611(a) of the South Carolina Rules of Evidence dictates that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." *See*, Rule 611(a), SCRE.

Therefore, while needing to demonstrate impartiality, the trial judge must nonetheless manage the trial, and with that comes the need to make evidentiary rulings for the record, to manage and control the presentation of evidence, and even at times to admonish parties, witnesses, and counsel. In addressing the related issue of a judge's recusal based on partiality, the United States Supreme Court recognized that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994). An exception to that standard occurs where the judicial remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment

impossible." *Id*. The Supreme Court distinguished, however, "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id*.

In sum, the standard for showing judicial bias or misconduct to vacate a jury's decision and require a new trial is necessarily a high one. It should and does present a strenuous burden to meet. That high burden has not been met by the Petitioner in this case.

B. Issue Preservation

This Court has ruled that "[i]t is the general rule that prejudicial remarks in the course of a trial made by the court must be seasonably objected to and an exception noted, in the absence of which the question will not be ordinarily reviewed on appeal. In general, the exceptions must be taken at the time the remarks are made." *Lipscomb v. Poole*, 247 S.C. 425, 147 S.E.2d 692, 697 (1966). This Court relied on its earlier decision in *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965), holding as follows:

> If the defendant considered the remarks of the trial judge prejudicial, it was its duty to call the matter to the attention of the court at that time by proper objection or motion. There is no sound reason to place matters of this nature upon a different basis from other occurrences during the trial of a case, in which the duty has been

> placed upon litigants to make timely objection in order to preserve the right of review. The fact that counsel may have some hesitancy in making objection during the trial to remarks or conduct of the court, which are considered prejudicial, does not excuse the failure to do so. An objection timely made to improper remarks or conduct of the court during the trial will afford in many instances an opportunity for correction of the error at that time or the granting of a mistrial as the particular situation requires. The interest of the trial court is only to see that a fair trial is had and objections to improper remarks or conduct on its part will be received in that spirit.

141 S.E.2d at 134. Similarly, the Court of Appeals has held that "[g]enerally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision." *State v. Thomason*, 355 S.C. 278, 584 S.E.2d 143, 148 (Ct. App. 2003).

In the case at bar, the Petitioner argues in an exaggerated and sensational manner that the trial judge "criticized and berated uncontroverted evidence." *See*, Petitioner's Brief, p. 4. The Petitioner, however, raises only three specific comments by the trial judge as the bases for his arguments on appeal.

First, the Petitioner references the following comment made by the trial judge after numerous questions about the need for the Petitioner to be examined by a physician upon entry to the Detention Center when in fact he had just been discharged from Greenville Memorial Hospital prior to his booking at the Detention Center:

> We’ve been down this road before, okay? We've been down this road before. I think you're pumping a dry well here. He was released from the hospital in Greenville. It's what I said over there earlier this morning. He cannot be boomeranged back between doctors. We need to move on from this line of questioning and focus on what your complaint is, and that is the six days without the neck brace, okay? So go.

(App. 382). Indisputably, there was no objection, contemporaneous or otherwise, raised to that comment. There was no mention on the record of any issues or concerns with the judge’s comment. There was no request for the trial judge to retrain from making such a comment. There was no request for a curative instruction. There was no motion for a mistrial. In fact, even after the verdict was returned, this issue was not raised in open court with the trial judge nor in post-trial motions. (App. 60, 716-717). In short, the trial judge was never given the opportunity to address this issue. Instead, the issue was raised for the first time on appeal, and as a result, the issue is not preserved. In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), this Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an

appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

Next, as to the issue of medication, the Petitioner complains that the trial judge stated: "Again, they weren't depriving him of medication that he needed, period. End of story. They were depriving him of narcotics, which he can't have in the jail. So I've got somewhat of a problem with that. But maybe I'll think on that." (App. 489). This comment was made during a colloquy between counsel and *outside the presence of the jury*. The trial judge was reviewing the deposition of Debra Knowles, the deceased ex-wife of the Petitioner, to determine which portions of the deposition would be published to the jury. The comment was made in addressing Knowles' testimony that the Petitioner was deprived of medicine at the Detention Center. (App. 488). There are numerous bases for excluding that testimony. The Petitioner is not arguing that he was denied a fair trial by the exclusion of that testimony from Ms. Knowles. Instead, he is challenging the trial judge's comment which the Petitioner fully admits was not made in jury's presence. As before, there is no objection, contemporaneous or otherwise, to the judge's comment. The Petitioner never raised this issue to the trial judge nor sought any relief. It was also not raised after the verdict was returned nor in post-trial motions. (App. 60, 716-717). The issue is not preserved for appellate review.

Third, the Petitioner complains that the trial judge *sua sponte* sustained an objection that was not made by opposing counsel. The transcript does not reflect an objection by the Respondent's counsel, but the trial judge's and counsel's reaction certainly would suggest that an objection was made and perhaps not transcribed. Certainly, there is no statement, objection, or challenge made on the record by the Petitioner's counsel to the effect that the Respondent had made no objection on which the court was ruling – and frankly that would have been most likely occurred had the scenario played out as now portrayed. Nonetheless, it is not an abuse of discretion for a trial judge to *sua sponte* limit an improper question. To set the scene, the Petitioner's counsel was questioning Lonnie Smith, the jail administrator, about the security video system, and Smith had explained that the system automatically over-writes existing footage every 90 days. (App. 389-390). The trial judge was reacting to the following question: "Don't you think the jury would like to see footage of Mr. Young while he was in the booking area?" (App. 390). In addition to sustaining an apparent but unrecorded objection, the trial judge stated: "This suit was filed years later, okay? The tapes get written over. Let's focus on what is truly an issue here and stop chasing rabbits, please, okay?" (App. 391). The trial judge recognized, as further explained in a later ruling (App. 444-445), that there is no claim of spoliation and he was not allowing the Petitioner to pursue that line of questioning suggestive of spoliation that did not occur.

Indisputably, there was no objection, contemporaneous or otherwise, raised to the trial judge's comment regarding the security video. There was no mention on the record of any issues or concerns with the judge's comment – neither at that time nor when the issue arose again during the testimony of Sharon Middleton. (App. 444-445). There was no request for the trial judge to refrain from making such a comment. There was no request for a curative instruction. There was no motion for a mistrial. In fact, even after the verdict was returned, this issue was not raised in open court with the trial judge nor in post-trial motions. (App. 60, 716-717). The Petitioner does not dispute that spoliation presents an evidentiary issue and not one for the jury. In short, this issue, like the others, is not preserved for appellate review.

In *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996), the Court of Appeals noted that the appellant failed to move for a corrective instruction or request a mistrial where objectionable evidence was presented and received before the judge was able to sustain the objection. The Court of Appeals found that the appellant "got what it asked for at trial and cannot now be heard to complain." 479 S.E.2d at 79. The same principle is at play here. The Petitioner had many opportunities to seek the judge's recusal or a mistrial if he truly believed that the judge's conduct rose to the level of depriving him of a fair trial. He took no action -- that is, not until he received an adverse verdict from the jury and filed

an appeal. At that point, it is too late. It was only after the Petitioner lost that he now deems the trial judge's comments as warranting a new trial (or what is in essence a belated mistrial). That, however, is not how our judicial system functions. A litigant cannot sit on his rights and then cry foul and seek *actual relief* only once he has lost. That is what the Petitioner has done here. He made no objection, sought no actual relief on, and sat on his rights throughout the four-day trial, and waited until he lost and filed his appeal to try to gain the advantage of a new trial.

Despite taking no action to properly preserve the issues he has raised with the trial judge's alleged conduct, the Petitioner relies on this Court's decision in *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994). That reliance is misplaced. The cases differ in many respects. The few isolated comments by the trial judge, as alleged in the case at bar, pale in comparison to the derogatory, condescending, and sexist comments by the trial judge in *Pace* which were made directly to the jury. The alleged judicial conduct in the two cases is significantly different. There is no gender or racial component in the present case. There is no challenge to counsel's competence as there was in *Pace*. In short, there is no fair comparison of the cases. In addition, while this Court recognized a "futility" exception to the contemporaneous objection requirement based upon the egregious scenario in *Pace*, this Court by no means suggested that such an exception would be

applicable in lesser scenarios where an aggrieved litigant is still required to make a contemporaneous objection, and if merited, to make a motion for corrective action -- be it for a curative instruction, a recusal, or a mistrial.

C. Evidence of Impartiality or Impropriety by the Trial Judge

As discussed, during the trial itself, the Petitioner made no effort to present any record of the alleged misconduct by the trial judge. He did not even make any objection, contemporaneous or otherwise, on the record at any point in the trial. He did not even raise these issues with the trial judge after the verdict was returned or in post-trial motions. (App. 60).

Moreover, on the merits, the comments do not support the Petitioner's claim that he was denied a fair trial. As to the comment on the issue of physician clearance upon entry to the Detention Center, the trial judge allowed the Petitioner's counsel some leeway to present such evidence, but when the testimony became repetitive, he advised counsel of the "need to move on from this line of questioning and focus on what your complaint is." (Tr. 388). That was well within the trial judge's discretion to control the presentation of evidence and to prevent unnecessary repetition. That is particularly true in light of the Petitioner's allegations of gross negligence in his Complaint which did not include any claim that the Respondent was grossly negligent in accepting the Petitioner into the

Detention Center upon his release from Greenville Memorial Hospital. (App. 44-45).

The next comment raised by the Petitioner deals with the deprivation of medication, and even the Petitioner admits that comment was made outside the presence of the jury. (Tr. 489). The trial judge was ruling on an evidentiary issue pertaining to the use of the deposition of the Petitioner's deceased ex-wife, and the judge expressed the basis for his rulings. That is not objectionable nor evidence that the Petitioner was denied a fair trial. In fact, it is legally frivolous to suggest prejudice from a trial judge's ruling outside the jury's presence, particularly where the Petitioner does not challenge on appeal the actual propriety of that evidentiary ruling.

Finally, as to the last comment pertaining to any alleged spoliation of evidence due to the over-written security footage, the trial judge's comment was appropriate in that the Petitioner had not made a claim for spoliation. Moreover, it is notable that the Petitioner is claiming he was denied a fair trial by the trial judge's comment, yet the Petitioner does not challenge the merits of the evidentiary ruling, i.e., the denial of a finding of spoliation and the denial of a spoliation instruction, which both present legal issues for the court and not for the jury. When the spoliation issue came up again during the testimony of Sharon

Middleton, the Petitioner once again took no exception to the trial judge's ruling on spoliation. (App. 444-445).

Thus, the three comments actually raised by the Petitioner do not support his claim that the trial judge's conduct denied him a fair trial.

D. **Improper and Objectionable Statement Purportedly Made To Petitioner's Counsel by Unidentified Juror**

While the Petitioner alleges that he was denied a fair trial and that there was juror confusion resulting from the trial judge's comments, there is no competent evidence to support such an allegation. Notably, the Petitioner did not raise this issue to the trial judge and never requested an evidentiary hearing where jurors could have been summoned and questioned by the court. The Petitioner did not even attempt to submit a supporting affidavit from any juror. Instead, in an unprecedented and improper manner, the Petitioner *presents his counsel's unsworn account of communications with one unidentified juror*. In his brief, the Petitioner writes:

> The jury deliberated, and all jurors agreed that the Sheriff's Office was negligent. However, after hearing inappropriate commentary on the evidence and an erroneous jury instruction, the jury determined that the Sheriff's Office was not grossly negligent. After trial, one juror commented that the Sheriff's Office had not done anything "intentional," which suggests the jury was confused by the jury instructions."

See, Petitioner's Brief, p. 2. The Petitioner further writes: "This information was gleaned during a conversation between Tony's counsel and a juror after the case was tried and counsel were free to speak with jurors." *See*, Petitioner's Brief, p. 2, n.3.

The Petitioner has not presented this information by sworn affidavit from a juror or jurors. Nonetheless, even if he had, that juror testimony would be inadmissible. "As a general rule, juror testimony is inadmissible to impeach a jury verdict." *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859, 867 (Ct. App. 2005). However, Rule 606(b), SCRE, creates a very narrow exception to that general rule and allows a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b), SCRE. Rule 606(b) further provides:

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ... [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. As the Court of Appeals has explained, "juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence." *Ziegler*,

610 S.E.2d at 867. "External influence on a jury involves situations where jurors receive information during deliberations from some outside source." *Id*.

In the case at bar, the Petitioner does not allege that the jurors received extraneous or external information from an outside source during their deliberations. Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). Likewise, the unidentified juror with whom the Petitioner's counsel purportedly spoke cannot speculate as to the decision-making process for other jurors.[2] Moreover, the purported comments by the unidentified juror to the Petitioner's counsel have not been reduced to writing and were not subject to any

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[2] In this respect, this Court's observation in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), is most pertinent:

> We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

661 S.E.2d at 372.

cross-examination by the Respondent's counsel, and in fact, those juror comments were not disclosed until the case was on appeal. For each of these reasons, the Petitioner's reliance on unsworn information purportedly from an unidentified juror is misplaced.

E. Lack of Prejudice

The Petitioner insists that the trial judge's comments in ruling on evidentiary issues and in generally controlling the presentation of evidence were prejudicial to his case. There is frankly no evidence to support that. There is no evidence that the jury's ultimate verdict was affected by the trial judge's comments as raised in this appeal. The jury found that the Respondent was not grossly negligent. (App. 714). The jury did not proceed beyond the first of the interrogatories included on the special verdict form.

Throughout his brief, the Petitioner claims that he "presented uncontested evidence of gross negligence." *See*, Petitioner's Brief, p. 8. That is untrue. In fact, as the trial judge found and the Petitioner has not contested, "[t]he Plaintiff and the Defendant presented conflicting evidence on the issue of gross negligence." (App. 8). In fact, the Petitioner cannot contest that because he never moved for a directed verdict or a JNOV on the issue of gross negligence, and even

if we had, that issue was not pursued on appeal. The record clearly reflects that the issue of gross negligence was contested.

Moreover, it is clear from the response to the polling of the jury following the reading of the verdict that all jurors agreed with the result. (App. 714). The Petitioner could have requested the individual polling of the jurors but did not do so. (App. 714). Likewise, if the Petitioner believed that the jury was impacted by the trial judge's comments, he could have requested a post-verdict evidentiary hearing, but he did not do so. In short, without a showing of prejudice from the alleged improper conduct of the judge, there is no basis for overturning the jury's verdict. *See*, *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004).

F. <u>Curative Instructions</u>

At the commencement of the trial, the trial judge gave the jury the following instruction:

> As I said a moment ago, you've been selected as fair and impartial jurors whose purpose it is to find and determine the facts in this case. Please understand that you're the sole judges of the facts, so if at any time I make any comments concerning the facts, you have to disregard any comment that I make. You'll determine the facts from the testimony and the other evidence that's introduced. Understand that you cannot be influenced by any opinions or statements you may have heard outside this courtroom.

(App. 125-126). Later, as part of his jury charge, the trial judge again told the jury as follows:

> Now, as has been said several times, ladies and gentlemen, you are the sole and exclusive judges of the facts in this case. Understand that a trial judge is not permitted to comment on or make any statement about the facts in any case tried by a jury. Since you're the sole judges of the facts, please don't think by anything that I've said during the progress of this trial in ruling upon the admissibility of evidence or otherwise that I have any opinion about the facts in this case. Ladies and gentlemen, the law does not permit me to have an opinion about the facts. This is solely for you to determine.

(App. 700-701). Under South Carolina law, "[j]uries are presumed and bound to follow the instructions of the trial judge." *Buff v. South Carolina Dept. of Transportation*, 342 S.C. 416, 537 S.E.2d 279, 284, n.4 (2000).

The Petitioner did not object to this portion of the charge as given by the trial judge. He also did not request any additional curative instruction to address what he is now arguing as misconduct by the trial judge. Based on the instructions given to the jury, there is a presumption that the jury understood and followed those instructions, including the admonition that the judge's comments and actions during the trial do not reflect that he has an opinion as to the resolution of the case. There is no reason to believe that the jurors did not follow those instructions as they are presumed by law to do. Accordingly, the Petitioner has not demonstrated prejudice to overturn a jury verdict following a contested four-day trial.

III. The trial court properly charged the defense of comparative negligence and the definition of "gross negligence."

The Petitioner also contends that the jury instructions were "erroneous and confusing" which resulted in the Petition being denied a fair trial. *See*, Petitioner's Brief, p. 10. Under South Carolina law, it is well settled that "[a] trial court must charge the current and correct law." *Stephens v. CSX Transportation*, 415 S.C. 182, 781 S.E.2d 534, 542 (2015). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Id*. "When an appellate court reviews an alleged error in a jury charge, it must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id*. "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "This holistic approach to jury instructions is linked to the principle of appellate procedure that an error not shown to be prejudicial does not constitute grounds for reversal." *Id*.

The Petitioner claims that the trial judge erred in charging the defense of comparative negligence. However, the evidence in the record, including the Petitioner's failure to take affirmative steps to seek medical care from the medical contractor (Southern Health Partners) while incarcerated at the Detention Center,

supports the trial judge's decision to charge comparative negligence. (App. 629-633).

Moreover, the Petitioner contends that the trial judge did not charge the jury that the Respondent bore the burden of proof on that defense. That is incorrect. The trial judge charged as follows:

> Now, ladies and gentlemen, in this case the defendant claims that the plaintiff's own negligence proximately caused the plaintiff's injuries. If you find that the defendant was negligent, then you must then decide whether the plaintiff was negligent. Defendant must prove by a preponderance or greater weight of the evidence that the plaintiff breached a duty of care which proximately caused the plaintiff's injuries, in this case the excessive pain.

(App. 706). Clearly, the jury was instructed that the "Defendant must prove" the elements of the comparative negligence defense.

Finally, even if the Petitioner is correct that the defense of comparative negligence should not have been charged, the Petitioner would still need to show prejudice. Citing this Court's decision in *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008), the Court of Appeals recognized that "[a]n erroneous jury instruction … is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." 663 S.E.2d at 33. The Court of Appeals correctly ruled that the special verdict form shows that the jury addressed only the first of the special interrogatories, namely "was the defendant grossly negligent," to which the

jury responded "no" thereby ending its deliberations. (App. 714). The jury thus did not reach the issue of comparative negligence which was the third of the special interrogatories on the special verdict form. (App. 708). As the Court of Appeals writes, "[b]ecause the jury found Respondents were not grossly negligent, they did not consider comparative negligence," and "[t]hus, we find the jury charge did not prejudice Young." (App. 1142).

The Petitioner also appears to challenge the trial court's instruction on "gross negligence." He argues that, in a purported communication with Petitioner's counsel, "[a]t least one juror made it clear that the jury thought an intentional act was required for a finding of gross negligence." *See*, Petitioner's Brief, pp. 10-11. The Respondent objects to the reliance on a purported conversation with an unidentified juror for which there is no record. That objection is based on the same reasons as discussed above in Section II.D of this brief. However, on its face, the following charge on the definition of gross negligence was proper and complete:

> While negligence is merely the failure of a person to exercise due care, gross negligence is the failure to exercise even slight care. That is, gross negligence involves a conscious failure to exercise due care. A person who was so indifferent to the consequences of his conduct as to not give a slight care as to what he is doing acts with gross negligence.

(App. 703). Moreover, no objection was raised by the Petitioner to that charge on "gross negligence." (App. 711). In short, the Petitioner has not demonstrated that the charge on "gross negligence" was erroneous or confusing, and certainly, there is no competent evidence to demonstrate any prejudice resulted from that instruction. The trial court, as affirmed by the Court of Appeals, did not err in denying a new trial absolute.

CONCLUSION

Based on the foregoing discussion, the Respondent Greenwood County Sheriff's Office respectfully requests that this Court affirm the decision of the South Carolina Court of Appeals which upheld the jury's verdict and the denial of the Petitioner's post-trial motions.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

RUSSELL W. HARTER, JR. #2778
CHAPMAN HARTER, P.A.
14 Lavinia Avenue
Post Office Box 10224
Greenville, South Carolina 29603
(864) 233-4500

Counsel for Respondent
Greenwood County Sheriff's Office

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