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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2023-001703

Mia Anderson, on Behalf of the Estate of Jessie Heyward a/k/a Jessie Bell Anderson — Appellant,

v.

Richard Miles Thompson, M.D., and ACS Primary Care Physicians – Southeast, P.C. — Respondents.

INITIAL REPLY BRIEF

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The vast majority of Respondents' 28-page response to Appellant's eleven-page brief consists of attempts to avoid the merits. Its entire discussion of the merits is less than a page. It makes virtually no attempt to address *Hurd*, the controlling case. It greatly misconceives the preservation and related rules on which it relies. The Court should reverse.

Argument

Re Respondents' I[1]: Temporary Rejection and Refiling Does Not Remove Jurisdiction.

The first twelve pages of the Initial Brief of Respondents (RB) are devoted to the contention that this appeal should be dismissed. It complains that Appellant filed the Rule 59 Motion to the clerk at 7:55 PM the night it was due and the next day the Clerk required it be resubmitted.

In Respondents' telling, the trial court lost jurisdiction over the case at 11:59 p.m. the night Appellant submitted her Motion, and there was nothing Appellant could do at that point other than file a Notice of Appeal. (RB 5) (stating that the trial court had "lost jurisdiction at the end of the day of September 25"); (RB 11) ("the trial court had lost jurisdiction to hear such a motion, and Appellant's only recourse was to file a notice of appeal . . . .").

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[1] Respondents' "I" is entitled "No Jurisdiction" in the table contents, and in text,

> The Court does not have jurisdiction to hear this appeal, since the notice of appeal was served more than 30 days after Appellant received written notice of entry of the order ending the case and the intervening post-trial motion was made more than ten days after the jury was discharged.

Respondents err as a matter of plain language and rules of construction, and their proposed rule is contrary to sound policy as stated by the Supreme Court.

A. Procedural Facts

Appellant filed a Motion for a New Trial. It is captioned "MOTION FOR NEW TRIAL." (R. p.). Its substance is all about a new trial. (R. pp. -). The lower court recognized as a Motion for a New Trial. (Ord. Den. Mot. for New Trial). Respondents' Brief repeatedly calls it a "Motion for New Trial." It was pursuant to SCRP Rule 59(b), which governs motions for new trials. "The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." The lower court allowed 10 days. Accordingly, the Motion was submitted via e-filing on the tenth day after the jury was discharged.

A supporting memorandum and exhibits were filed with the Motion as separate PDF documents. The next day, September 26, 2023, the Clerk temporarily rejected the entire filing for failure to have "redact[ed] personal information" on one exhibit. (R. p.). The motion, the memorandum, the redacted exhibit and other exhibits were accepted that same day, September 26. (R. p.).

B. Law

1. Rule 59(b), SCRCP, governs motions for new trials. It requires the motion be "made" not later than ten days after the jury is discharged. (A "motion for a new trial shall be made . . . not later than 10 days" after the jury is discharged.)

2. Provision 4(c) of the South Carolina Electronic Filing Policies and

Guidelines (SCEF), entitled "Timeliness," states, "A document transmitted and received by the E-Filing System on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed with the Clerk of Court on that date, provided it is subsequently accepted by the Clerk of Court."

3. Clerks do not have authority to make filings late due to unredacted personal information. Rule 41.2, SCRC states, "(c) Responsibility to Redact. The clerks of court and their staff will not review filings for redaction or to determine if materials should be sealed pursuant to Rule 41.1, SCRCP. The responsibility for ensuring that information is redacted or sealed rests with counsel and the parties." (emphasis added). SCEF Provision 10(b)(2) similarly states,

> The Clerks of Court and their staff are not responsible for reviewing filings to determine if materials should be redacted. The responsibility for redacting personal identifying information rests solely with the E-Filer. If the Clerk of Court discovers unredacted personal identifying information in an E-Filed document, the Clerk may require that the party E-File an amended document that properly redacts personal identifying information.

(emphasis added).

4. Civil procedural and appellate rules are to be interpreted to enable consideration of issues on their merits. "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party" and "should not be construed in manner which . . . deprive[s] an applicant of the adjudication on the merits . . . ." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (citing *Gamble v. State,* 298 S.C. 176, 379 S.E.2d 118 (1989)). *See also In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632,

641, 686 S.E.2d 683, 688 (2009) ("In invoking Rule 204(a), we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers.") (citing *Elam* and *Gamble*).

5. So too are the e-filing provisions construed to ensure consideration on the merits. "These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits." SCEF Provision 11(e) (entitled "Construction").

6. SCEF Provision 4(c) states, "Except as provided in Section 9, nothing in these Policies and Guidelines should be construed to reduce or extend any filing or service deadlines set by statute, the South Carolina Rules of Civil Procedure, or orders of the court." (emphasis added).

C. Application of Law to Facts

1. The motion was timely made under Rule 59(b), which allows ten days; Appellant submitted it on the tenth day; SCEF Provision 4(c) states it counts as filed with the Clerk of Court on that date, as it was subsequently accepted by the Clerk of Court.

2. Respondents' convoluted arguments about service are beside the point. Those arguments rest on Rule 59(e), which governs motions to alter or amend judgments. As the motion here was not under Rule 59(e), the Court need not deal with the academic question of what should happen had a Rule 59(e) motion been

served on the eleventh day under otherwise similar circumstances.[2]

Appellant believes that covers the matter, especially because if there is any doubt, or any inconsistency among the rules, guidelines, and policies, the rules of construction require the provisions be construed to enable a decision on the merits. *Elam; In re Nov. 4, 2008 Bluffton Town Council Election*; SCEF Provision 11(e).

If further discussion is desired, it is provided immediately below.

3. Respondents' argument fails for additional reasons.

a) The plain language controls. *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019); *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *State v. Carrigan,* 284 S.C. 610, 616, 328 S.E.2d 119, 122 (Ct. App. 1985). Here, the plain language of SCEF 4(c) states that the document is "considered filed" on the date it was submitted, and therefore timely. There is thus no need for statutory construction, but if there were, the provisions should be construed to enable a decision on the merits, as noted above.

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[2] Rule 59, SCRCP, entitled "New Trials; Amendment of Judgments," governs two types of motions, motions for new trials and motions to alter or amend judgments. Motions for new trials are governed by paragraph (b). Motions to amend judgments are governed by paragraph (e). *Compare* ¶ (b) ("The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.") *with* ¶ (e) (A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.") (emphases added).

If the drafters intended the requirements be identical for both motions for new trials and motions to amend judgment, they would not have set out separate requirements for each. It would have been extremely poor draftsmanship to set out different requirements for different kinds of motions if they meant to have the same requirements for all. The Court should not attribute such poor draftsmanship to the drafters.

b) Respondents' argument that clerks of court have the authority to review filings for redaction and make motions untimely due to unredacted personal information contradicts Rule 41.2, SCRC and SCEF Provision 10(b)(2). "The clerks of court and their staff will not review filings for redaction . . . ." Rule 41.2, SCRC. If a Clerk does review a filing for redaction, SCEF Provision 10(b)(2) makes the remedy clear: "the Clerk may require that the party E-File an amended document that properly redacts personal identifying information." An "amended" filing implies that there was an earlier filing. Filing an amended document after a deadline does not mean the filing deadline was missed.

c) Each exhibit was uploaded as a separate PDF document, not in the same PDF document as the Motion. It is not Appellant's fault that the system apparently is unable to postpone acceptance of just the offending document but must also postpone accepting anything associated with it. There was nothing improper in the Motion itself.

d) Respondents' position is contrary to the intent of the fourth e-filing provision to establish a "mailbox rule" for e-filing. That provision states in paragraph (e),"The act of E-Filing the pleading, motion or other paper is the equivalent of depositing it in the United States Mail under Rule 5(b)(1), SCRCP." If one served an unredacted document via United States Mail, and the opposing party claimed the court lacked jurisdiction because a redacted document would have been proper, the opposing party would likely receive a stiff talking to.

e) Respondents' call to require appeals when a last-day filing is

temporarily rejected conflicts with policy as stated by the Supreme Court. *Compare* Brief of Respondents 11 ("the trial court had lost jurisdiction to hear such a motion, and Appellant's only recourse was to file a notice of appeal . . . .") *with Elam,* 361 S.C. at 22, 602 S.E.2d at 779 ("[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for freely allowing motions for reconsideration) (alteration in original) (emphasis added).

f) Further, Respondents' position would be bad policy. It would unnecessarily increase the workload of the appellate courts. Respondents want the Court to require full-fledged appeals when last-day Rule 59(b) or (e) motions are temporarily rejected by a clerk of court. In these cases, trial judges who are already familiar with the facts and the law can often resolve the matter more expeditiously than appellate courts can, or can clarify their reasoning to ease burdens on the appellate courts. Under Respondents' proposed rule, litigants would be unable to allow lower courts to correct their own errors in situations like this. Respondents' interpretation would require issues lower courts could resolve expeditiously under Rule 59 to instead become full-fledged appeals.

g) Respondents write, "If a document is rejected by the clerk of court and is therefore untimely, the party may seek appropriate relief from the court upon good cause shown . . . ." (RB 10) (quoting SCEF 4(d)(2)). But under Respondents' proposal, lower courts have no jurisdiction to provide "appropriate relief" when a last-day Rule 59 motion is temporarily rejected, as they have lost jurisdiction to do anything—including granting relief from the clerk's postponement

of acceptance.

h) The document Respondents complain about is the death certificate of Plaintiff's own decedent. It would be grossly out of proportion for an estate's entire appeal to be dismissed for failing to redact the decedent's information from an exhibit.[3]

4. Nevertheless, if the Court agrees with Respondents on what the rule should be, permanent dismissal of this appeal due to a temporary rejection by the lower court clerk would be overly harsh. The Supreme Court, faced with a similar issue in *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 213–14, 810 S.E.2d 856, 857 (2018), held (emphasis added),

> Since the notice of appeal was not served until thirty-one days after the parties received the email, we agree with the Court of Appeals that the service of the notice of appeal was untimely. However, given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistent case law interpreting Rule 203, SCACR, fairness dictates that our ruling on this issue be applied prospectively. Accordingly, we affirm as modified and remand to the Court of Appeals to allow the appeal to proceed on its merits.[4]

The Supreme Court repeated, "fairness dictates that our holding on this issue

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[3] Respondents attempt to bolster their argument by emphasizing the importance of privacy in this case. The effort is misguided, as dead people have no privacy rights. *See, e.g., Soc'y of Pro. Journalists v. Sexton*, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (citing18 A.L.R.3d 873 (1968), 62 AM. JUR. 2d, Privacy, § 12 (1972)).

[4] The *Wells Fargo Bank* majority rejected the dissent's argument, *id.* at 220–21, 810 S.E.2d at 861, that the "bright-line" aspect of the rule required the appeal to be dismissed. *Id.* at 219, 810 S.E.2d at 860 (noting the "attempt to overlay Rule 203, SCACR to modern practice has resulted in justifiable confusion to the Bench and Bar.")

be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law." *Id.* at 217, 810 S.E.2d at 859. *See also Anderson Cnty. v. Preston*, 427 S.C. 529, 539 & n.6, 831 S.E.2d 911, 916 & n.6 (2019) ("We take this opportunity to clarify that a quorum is required . . . . However, due to the unsettled law . . . at the time . . . . This ruling shall apply prospectively."); *Trowell v. S.C. Dep't of Pub. Safety*, 384 S.C. 232, 237, 681 S.E.2d 893, 896 (Ct. App. 2009) ("We find the agency's interpretation of its service rules was overly harsh in this situation.") (reversing denial of appeal for late service). Should the Court interpret the rules, policies and guidelines as Respondents ask, the Court should set the rule prospectively.

In sum, Respondents' position is contrary to the plain language and the rules of construction, and would be bad policy, and if it is to be the policy, it should apply only prospectively.

Respondents' II Fails on Its Own Terms and for Other Reasons.

Respondents' "II" complains that Appellant's Statement of the Issue is not sufficiently concise and direct.[5] Appellant disagrees, but even if the Statement of the Issue were insufficiently clear, considered in isolation, Respondents' II would fail on its own terms.

[5] Respondents' II is entitled "No Appealable Issue Stated Concisely and Directly" in the Table of Contents, and in text, "Appellant has not stated concisely and directly any issue for review."

Respondents recognize that courts will "forgive" insufficient statements of issues if the party's argument is nonetheless reasonably clear. (RB 13) (citing cases).[6] But Respondents never contend that Appellant's argument is unclear. Instead, Respondents' Brief goes straight back to arguing that the Statement of the Issue is unclear. (RB 13-14). Because Respondents recognize that it suffices if a party's argument is clear, and never claim Appellant's argument is unclear, and never say what relief they request, Respondents' II should be rejected.

Nor would it have been credible to claim Appellant's argument is not "reasonably clear from the brief," *Gibson*, 420 S.C. at 542 n.2, 804 S.E.2d at 279 n.2, as Respondents certainly found the argument clear enough to respond to. Appellant's argument is clear. Were one to examine the content of the Argument in Appellant's opening brief, as appellate courts have done in other cases, to determine whether it is reasonably clear in conjunction with the statement of the issue, one

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[6] Respondents' first case, *Gibson v. Ameris Bank*, 420 S.C. 536, 804 S.E.2d 276 (Ct. App. 2017) states, "While the word 'agency' was not included in Ameris's statement of issues on appeal, it is reasonably clear from the brief . . . ." *Id.* at 542 n.2, 804 S.E.2d at 279 n.2 (thus reaching the merits) (emphasis added).

Respondents' second case, *Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) states, "Wife further asserts the issue is not properly presented on appeal because it is not set forth in the statement of the issues on appeal. . . . We hold this statement when read in conjunction with Husband's argument adequately raised the issue."

Respondents' final case, *Southern Welding Works, Inc. v. K & S Const. Co.*, 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985) states, "The exceptions are in plain violation of the rule," yet that was no bar to considering "those issues which are reasonably clear from K & S's argument . . . ." *Id.* (emphasis added).

would find the argument in Appellant's opening brief sufficiently clear.[7]

Respondents' II should be rejected.

Appellant's Argument Is Preserved. Respondents' III Errs in Arguing It Is Not.[8]

A. *Hurd* Requires Reversal.

Appellant's eleven-page opening Brief makes clear that the controlling case here is *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996).[9] Appellant cited only five cases and no other authorities. Respondents' Brief requires 33 cases and 32 other authorities as it attempts to evade the issue. The half-hearted attempt to distinguish *Hurd* at the end of Respondents' III—one very short paragraph— relies

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[7] As stated in Appellant's opening Brief,

> The exchange between Court and counsel here is virtually identical to the exchange in *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94, 97 (Ct. App. 1996) . . . .
>
> Holding that "a juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict," this Court reversed. (quoting *Hurd*) (internal citation omitted). . . . .
>
> So too here. If a juror who has not heard all the court's instructions is grossly unqualified, so too is a juror who has heard the instructions but declares her refusal to follow them. A juror who says "F*** you" to the Judge in the courtroom indicates an unwillingness to follow the Court's directives. A juror who announces in the jury room her refusal to follow the Court's directions does so explicitly. For the same reasons this Court explained in *Hurd*, Ms. Anderson should "be given a new trial." *Id*.

(Brief of Appellant (AB) 9-10).

[8] Respondents' "III" is entitled "No Error Preserved" in the table of contents, and in text, "III. Appellant did not preserve any of the issues she raises on appeal."

[9] *Supra* Note 7.

entirely on mis-stating the record. It comes at the end of Respondents' III, and thus at the end of Respondents' lengthy attempts to avoid the merits. (RB 26). Referencing *Hurd*, Respondents write, "there, the trial court was found to have incorrectly denied the appellant's request that a juror be questioned. Here, Appellant never asked for such a thing . . . ."

That is simply not so.

The entirety of the request in *Hurd* was, "I would ask the court to remove him and replace him with the alternate. Or bring him in and question him as to whether he knows what you said because I think it's important that he—." 480 S.E.2d at 97. The defendant there thus asked the trial court to remove the juror or, in the alternative, to question him to determine whether to remove him—exactly like Appellant did here.

> MS. SEITHEL: Your Honor, I'm wondering if there's anything that you can do to try to fair it out who the other juror was, or if it was the forelady. I mean, I think it's completely inappropriate for anyone on that jury to use "F you," especially towards Your Honor.

(444:8-13.)

The trial judges' responses in the two cases are also virtually identical. In *Hurd*, the trial judge stated, "I noticed him nodding off a couple of times, but he was alert during most of the charge. I'm not going to remove him." 480 S.E.2d at 97. Here, the judge stated that he was not going to question any juror and was not going to remove the forelady. "I don't want to say anything about that . . . ." (Tr. 444 line 17-18) (regarding questioning the jury).

She tried again.

> MS. SEITHEL: Well, I think we're sort of collectively in agreement on this. But we all watched pretty intently the jurors while you were giving your instructions, and as Dr. Streiff -- as you called him up, the foreperson gave a big roll of her eyes at, I'm not sure if it was you, Dr. Streiff, myself, or Ms. Simmons. But -- and then also as Ms. Ballentine proceeded with her questioning, and I did with mine -- honestly, I don't think she wants to be here at all, Your Honor, because she shot the same daggers at both of us.
>
> MS. MASON: Yes.
>
> MS. SEITHEL: And it's very -- I think it taints the entire jury; I think that it taints the entire process. It's very -- I mean --
>
> MS. MASON: It's very disruptive.
>
> MS. SEITHEL: Very disruptive, not just to the jury, but also to the witnesses and to the lawyers.
>
> MS. MASON: I mean, it's distracting.
>
> MS. SEITHEL: Yes, agreed.
>
> MS. SIMMONS: Your Honor, also we have two alternates who appear to be listening attentively and certainly capable. So, I am in agreement to release the forelady, if the Court -- if Your Honor agrees.
>
> THE COURT: So, as I understand -- what you're telling me is both of y'all want me to remove the foreperson from the jury?
>
> MS. SEITHEL: Or check in with her, because something is different today with her than yesterday and the day before.

(458:25-460:4) (emphasis added). The judge gave the same answer. He repeated that "I'm not going to take her off right now and everything." (461:8-9).

Appellant did everything the appellant in *Hurd* did, and she did it twice.[10] If anything, the present case is an *a fortiori* version of *Hurd*: as here, the acts were clearly willful unlike accidentally falling asleep there, and here, the errant juror was the foreperson, who holds a position of authority within the jury room.

Because Respondents have no compelling response to *Hurd's* compelling holding, the lower court should be reversed.

B. Respondents' Arguments Fail.

Respondents' III contains three subsections. Two deal with what Respondents assert are the facts. The third, entitled "Argument and Law on Error Preservation," itself contains three sub-subsections. (RB 22-26). The first of these sub-subsections is entitled "General Error Preservation Rules." It is the equivalent of a "Law" section in most briefs and has no application of the law to the facts. The final two sub-subsections, the ones containing the actual argument, are "Failure to Object to Allegations of Pre-verdict, Intrinsic Juror Misconduct" and "Failure to Ask for an Evidentiary Hearing." (RB 23-26). These are addressed in turn.

1. a) Respondents' contention of a supposed "Failure to Object to Allegations of Pre-verdict, Intrinsic Juror Misconduct" (RB 22-25) is misguided. Counsel repeatedly brought their concerns and proposed resolutions to the attention of the trial judge, as discussed in II.A above. Further, the trial judge and counsel understood the entreaties on this issue to be "motion[s]." (444:21; 522:14-19). Our

[10] And she did more: "I think it taints the entire jury; I think that it taints the entire process." (Tr. 459:12-14) (Appellant's counsel).

case law establishes that "motions" suffice to preserve issues. "Magic" words are not required. Regardless of whether the word "objection" was used, it was clear to the trial court that he was being asked to investigate the forelady or to remove her without any investigation. (458:25-460:4).

All of this was before the verdict. Thus, the three cases Respondents extensively discuss under that heading are inapplicable. (RB 23-25) (discussing *State v. Chhith-Berry*, 437 S.C. 527, 878 S.E.2d 352 (Ct. App. 2022); *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003); and *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999)). Those cases are all about failures to request any relief until after the verdicts, even though the appellants there knew of the potential misconduct before the verdicts.[11] As may be obvious, a party who complains before the verdict of improper juror conduct is in the strongest position to reverse the trial judge. A party who complains only after the verdict because she received the information after the verdict is in a position of intermediate strength. A party who has the evidence of improper conduct before the verdict, but waits until after the verdict to complain, is in the weakest position. Respondents' cases are all in this

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[11] "Chhith-Berry waited until after the jury submitted its guilty verdict to raise the issue . . . ." *Chhith-Berry*, 437 S.C. at 549, 878 S.E.2d at 364.

"Both [counsel] . . . are satisfied . . . [and] do not desire any further inquiry . . . ." *Vang*, 353 S.C. at 85, 577 S.E.2d at 228.

"[P]rior to the jury's verdict, counsel for Aldret . . . discovered the [problem]. . . . [Yet] there is no indication **on the record** that the trial judge was made aware of this fact, or that the trial court was asked, prior to the verdict, to question the jurors . . . ." *Aldret*, 333 S.C. at 312, 509 S.E.2d at 813.

weakest category: They waived their right to complain because they waited until after the verdict.

The argument as stated in the heading ("Failure to Object") is refuted.[12]

b) Respondents have two more arguments. They complain, first, that the final renewal at the end of the testimony was made by Respondent, not Appellant. Respondents' complaint is about the second renewal. The initial motion was made by Appellant, quickly joined by Respondent. (443:23-444:14). The first renewal was made jointly. "MS. SEITHEL: I hate to ask again, but if we could excuse the jury for a few minutes, Ms. Simmons and I would like to ---" (458:15-17). The judge understood it to be a joint motion. (459:24-460:1).

Respondents' argument is that Appellant cannot rely on Respondents' statement, after the end of testimony, that "we would like to renew our earlier motion" (*id.* at 721:6) (emphasis added); "we were hoping at this later date, you might, perhaps, consider removing her . . . ." (*id.* lines 20-21) (emphasis added). Respondents offer no analysis as to why this language does not include Appellant.

The obvious reading of "we would like to renew our earlier motion" and "we were hoping" is that both sides wanted to renew.

But even assuming, for the sake of argument, that the second renewal

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[12] The heading itself is nonsensical: "Failure to Object to Allegations of Pre-verdict, Intrinsic Juror Misconduct." How is one to "object" to "allegations" of juror conduct? Attorney 1: "Your Honor, I allege juror misconduct." Attorney 2: "I object!" ? Nevertheless, Appellant responds to the argument Respondents make in this sub-subsection.

excluded Appellant, Respondents' "no third renewal" argument fails, as does their related "no motion for mistrial" argument, for the simple reason that any additional renewal or motion for mistrial would have been futile. The Supreme Court and this Court have repeatedly held futile motions or objections are not necessary to preserve issues for review. "This Court does not require parties to engage in futile actions in order to preserve issues for appellate review." *State v. Wiles*, 383 S.C. 151, 157 n.4, 679 S.E.2d 172, 175 n.4 (2009) (quoting *Staubes v. City of Folly Beach,* 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000)); *Bennett v. ACS Primary Care Physicians-Se. P.C.*, 444 S.C. 458, 469 n.3, 908 S.E.2d 110, 115 (Ct. App. 2024) (virtually identical);[13] *Cole v. Raut*, 365 S.C. 434, 445 n.1, 617 S.E.2d 740, 745 n.1 (Ct. App. 2005) ("This court does not require parties to engage in futile actions in order to protect their interests on appellate review."), *rev'd on other grounds*, 378 S.C. 398, 663 S.E.2d 30 (2008). Objecting "would have been futile and was therefore unnecessary." *Carter v. Peace*, 229 S.C. 346, 355, 93 S.E.2d 113, 117 (1956) (emphasis added).[14]

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[13] *Bennett* appears to be the Court's most recent pronunciation on the issue.

[14] South Carolina appellate courts have applied the rule against requiring futile acts in a variety of contexts. For examples, "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." *Brown v. James*, 389 S.C. 41, 54–55, 697 S.E.2d 604, 611 (Ct. App. 2010) (collecting cases). "Any attempt to give the lessors timely personal notice, therefore, at the designated address would have been a futile act, which equity does not require" *Carmichael v. Dan Nance Corp.*, 274 S.C. 357, 361, 264 S.E.2d 601, 603 (1980). "Equity will not require the doing of a futile task, nor foreclose the rights of a party

Here, after being told, "we would like to renew our earlier motion in the trial to remove the forelady from the jury" (721:6-7), the Judge responded, "I'm going to leave her on." (*Id.*:16.) Respondents' counsel tried again: "we were hoping at this later date, you might, perhaps, consider removing her and replacing her with one of the alternates." (*Id.*:20-22). The judge repeated: "I'm not going to do that." (*Id.*:23-24).

> A party is not required to harass the trial judge with repetitive objections when an intelligible one has been made. *See State v. Higgenbottom,* 337 S.C. 637, 640–641, 525 S.E.2d 250, 251 (Ct. App. 1999) (quoting *State v. McDaniel,* 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon ... counsel to harass the judge by parading the issue before him again.' ")).

Long v. Norris & Assocs., Ltd., 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2000) (alteration in original).

Cases where the futility is established by rulings on other parties' motions are not exceptions, nor are renewals of motions or motions for mistrials. If the motion or objection is futile, it is futile. It is "therefore unnecessary." *Carter,* 229 S.C. at 355, 93 S.E.2d at 117. *Bennett*, 444 S.C. at 469 n.3, 908 S.E.2d at 115 n.3 (there was no need for a motion for reconsideration regarding one plaintiff, when identical underlying motions had been made, and the trial judge had denied

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from obtaining specific performance for failure to do something which in view of all the facts would have been useless." *Id.* (quoting *Elliott v. Dew*, 264 S.C. 40, 212 S.E.2d 421).

reconsideration regarding the other plaintiff[15]); *Cole*, 365 S.C. at 445 n.1, 617 S.E.2d at 745 n.1 (where trial judge had rejected one party's request for a special verdict form, it would be futile for the opposing party to request the same relief the trial court had denied) (citing authorities).

In *City of Columbia v. Myers,* the Supreme Court held,

> It is contended that the failure of defendant's counsel to request a curative instruction, a mistrial or new trial after his objection had been overruled is fatal. This Court has held in *Bowers v. Watkins Carolina Express, Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190, that motions for mistrial or new trial in such circumstances would be futile and are not necessary to preserve a timely objection for review. By the same logic it would be both futile and nonsensical for counsel to request curative instructions from a trial court which has already ruled an argument to be proper.

278 S.C. 288, 289, 294 S.E.2d 787, 788 (1982) (emphasis added). This Court has regularly followed *Myers* on this point. In *State v. Wilson*, 389 S.C. 579, 584–85, 698 S.E.2d 862, 864–65 (Ct. App. 2010), this Court noted "the established rule and rationale of *Myers,*" quoted the same portion, and applied it to renewals of motions; *see also Washington v. State*, 440 S.C. 550, 567, 891 S.E.2d 668, 677 (Ct. App. 2023) (following *Wilson*). "[A] plethora of cases articulate the rule." *State v. Primus*, 341 S.C. 592, 605, 535 S.E.2d 152, 159 (Ct. App. 2000), *aff'd in part, rev'd in part,* 349 S.C. 576, 564 S.E.2d 103 (2002). *See also State v. Sweet*, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) (condensing *Myers* as "issue of improper closing

[15] *Bennett* states, "Under these circumstances, filing a motion for reconsideration in Gasser's action would have been futile. Therefore, we consider the issues raised by Gasser but not addressed by the circuit court adequately preserved for review." 444 S.C. at 469 n.3, 908 S.E.2d at 115 n.3.

argument was preserved for appellate review despite failure of defense counsel to request curative instruction, mistrial, or new trial after his objection had been overruled").

Such motions are "not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there." *Bowers*, 259 S.C. at 376, 192 S.E.2d 190 at (1972) (citing *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). "Any further motion or exception would have been futile and was unnecessary." *J. W. Green Co. v. Turbeville*, 263 S.C. 456, 459, 210 S.E.2d 743, 744 (1974) (citing *Carter*, 229 S.C. 346, 355, 93 S.E.2d 113; *Smith v. City of Greenville*, 229 S.C. 252, 92 S.E.2d 639). "It is no answer to suggest that appellant should have asked for a mistrial, because . . . it is obvious that a motion for a mistrial would have been a futile thing." *State v. Van Williams*, 212 S.C. 110, 116, 46 S.E.2d 665, 668 (1948). "It is not 'incumbent upon defense counsel to harass the judge by parading the issue before him again, by asking for a mistrial.'" *State v. Holliday,* 333 S.C. 332, 338–39, 509 S.E.2d 280, 283 (Ct. App. 1998) (quoting *Dunn v. Charleston Coca–Cola Bottling Co.,* 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993)).[16]

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[16] In *State v. Holliday*, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998), this Court made the point repeatedly.

> Because of this discussion, the grounds for Aaron's attorney's objection would have been apparent to the trial court. The court even stated it understood Aaron's objections. Moreover, it is clear from earlier portions of the record that the trial court understood the objection. . . . Because the trial court was aware of the grounds for the objection, Aaron's attorney was not required to reiterate his previous argument. *See Dunn v. Charleston Coca–Cola Bottling Co.,* 311 S.C. 43, 46, 426 S.E.2d 756, 758

It would have been futile for Appellant to re-renew the motion when the Judge had just ruled, twice, that he was not going to grant it.

2. Respondents' claim of a supposed "Failure to Ask for an Evidentiary Hearing" is flawed. Respondents write, "We do not contest the proposition that where evidence supporting juror misconduct is credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred." (RB 25) (citing *State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005)). They add, "But if Appellant didn't ask for an evidentiary hearing or didn't ask for more of one than was made, then she can't complain." *Id*. Respondents put all their chips in this sub-subsection on that claim. But *Zeigler* says nothing about any requirement to request an evidentiary hearing or to request more of one than was provided. (Nor does *Hurd*.)

(1993) (It is not "incumbent upon defense counsel to harass the judge by parading the issue before him again, by asking for a mistrial.").

Id. at 338–39, 509 S.E.2d at 283 (emphasis added).

Likely to ensure the point was not missed, this Court then stated,

> Additionally, Aaron was not required to move for a mistrial or a new trial in order to preserve this issue for our review. *See State v. Blyther,* 287 S.C. 31, 336 S.E.2d 151 (Ct. App.1985) (A motion for a new trial is not needed for a defendant to preserve an error where the objection that prompted the error was ruled on by the trial court.); *City of Columbia v. Myers,* 278 S.C. 288, 294 S.E.2d 787 (1982) (Once an objection has been overruled, it is not necessary to make a motion for a mistrial or a new trial to preserve an error for appellate review.); *Bowers v. Watkins Carolina Express, Inc.,* 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972) ("A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there.").

Id. at 339, 509 S.E.2d at 283 (emphasis added).

And even if *Zeigler* had said that, Appellant did ask for an investigation, e.g. (444:8-13), and—to the extent the judge's admonishment of the jury might be seen as an investigation—for more of one than was made, e.g. (458:25-460:4).[17]

Thus, *State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005), the only case Respondents cite to support this contention, does Respondents no good.

Summation to IIII.[18] Respondents have totally failed to mount a persuasive claim that the appeal should be dismissed on error preservation grounds. The Judge knew what he was being asked to do. The law required him to do it.

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[17] If Respondents mean that "evidentiary hearing" is a magic phrase that must be uttered, they err. Magic words are not required by our appellate courts. *Brockbank v. Best Cap. Corp.*, 341 S.C. 372, 380, 534 S.E.2d 688, 692 (2000); *Moore v. Edwards' Exrs*, 17 S.C.L. 23, 24 (S.C. App. L. & Eq. 1828) ("There is nothing magical in the term itself."); *Stallings v. Ratliff*, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987). The substance controls. *Brockbank, Moore; Stallings.* Appellant asked for the equivalent. Whether she called it a "hearing" or not is irrelevant.

[18] The subsections of Respondents' "III" that are labelled "Background Facts" and "Facts Related to Allegations of Juror Misconduct" contain many assertions that are not included in their subsection on "Argument and Law." The Court need not and should not reach these assertions from which no argument is made. To the extent, if any, that the Court is interested in those assertions, Respondents describe one as "of upmost importance." (RB 19). This is that when the judge asked, "what you're telling me is both of y'all want me to remove the foreperson from the jury?," Appellant responded, "Or check in with her, because something is different today with her than yesterday and the day before."

Appellant's counsel did exactly what she was supposed to do: remind the judge that there was another option. The court was thus asked either to remove the juror or to investigate further to determine whether removal was justified. Appellant did not say "instead" of removing the juror, investigate her: She requested the judge do either, remove or investigate. This was entirely proper. *Hurd*; *Zeigler*. This is almost verbatim what was asked in *Hurd*: "I would ask the court to remove him and replace him with the alternate. Or bring him in and question him . . ." 480 S.E.2d at 97.

Re Respondents' IV: [19]
Respondents Scant Defense on the Merits Fails.

Respondents' argument on the merits is thin, a page and a half for the entire substantive issue, and half of that is devoted to the standard of review. Respondents' "IV" ignores *Hurd*,[20] but the case remains fatal to their position.

Respondents state that the standard here is abuse of discretion. (RB 26-27). Appellant agrees. (Appellant's Brief (AB) 8). So does *Hurd*: "Whether to replace a juror with an alternate is a matter within the sound discretion of the trial judge, and we will not reverse him on appeal absent an abuse of discretion." 325 S.C. 384, 480 S.E.2d at 97) (emphasis added). But *Hurd* held the trial judge abused his discretion, under that very standard, on facts just like the present facts. "The trial judge committed reversible error . . . ." *Id.*

This because "[A] juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." *Id.* "[I]t is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified . . . ." *Id.* "[T]he court must not speculate . . . ." *Id.* So too here. A juror who has not heard the court's instructions, or, worse, has heard and announced she will not follow them,

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[19] Respondents' IV is entitled "No Abuse of Discretion" in the table of contents, and in text, "The trial court did not abuse its discretion."

[20] The Brief of Respondents' limited discussion of *Hurd* is in its "III," regarding error preservation, wherein they erroneously claim that Appellant "never asked" that a juror be questioned. (RB 26).

"is grossly unqualified to render a verdict."

Also, Respondents largely concede the point. They write, "We do not contest the proposition that where evidence supporting juror misconduct is credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred." (RB 25) (emphasis added). When a trial court "must" do something, he lacks discretion not to do it. E.g., *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 453, 748 S.E.2d 221, 225. 228 (2013) (so holding).[21]

To repeat, this is more than a case about early deliberations. Those cases concern whether qualified jurors began deliberating early. This case is about the lower court's failure to properly ensure the jurors were qualified, and were willing

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[21] Respondents attempt to back-door a claim that even if the lower court abused its discretion, there was no prejudice shown. But on facts almost identical to the facts here, this Court in *Hurd* did not ask whether the juror was in fact sleeping or whether the sleeping caused any prejudice. It would make no sense to do so. "Does your refusal to follow my instructions affect your vote?"

Nor do Respondents make any attempt to distinguish *Hurd* on this ground. In both cases, any ability to show prejudice was eliminated when the trial court refused to question the juror(s). The burden was on the judge, not the movant, to allow such questioning.

> Thus, we hold that "it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified," and "the court must not speculate ... but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record."

Hurd, 480 S.E.2d at 97 (alteration in original).

Respondents themselves recognize the key role served by granting a request to investigate. "[*H]ad a timely request been made*, 'the court could have *voir dired* the jury prior to its verdict to determine if, in fact, there had been premature deliberations, and whether [the appellant] had been prejudiced thereby.'" (RB 24) (quoting *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999)).

to at least *try* to follow the trial court's instructions, and the trial court's failure to take the required steps to do so.

Conclusion

There was credible evidence that the foreperson said "F*** you" to the Judge, announced she would not follow his directive, and engaged in a series of disruptive facial expressions. When a juror is showing obvious contempt of Court she is not qualified to sit as a juror. What was stated in Appellant's opening brief remains true: "For the same reasons this Court explained in *Hurd*, Ms. Anderson should be given a new trial." (AB 10) (internal quotation marks omitted). Respondents have not successfully distinguished this case from *Hurd*. Their attempts to create new obstacles to reaching the merits of cases should be rejected.

The Court should remand for a new trial before a set of jurors who are willing to follow the judge's instructions.

Respectfully submitted,

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