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
Trial Court Case No. 2020-CP-08-01232

Appellant 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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal follows a verdict for the defense in a medical malpractice action for wrongful death and survival. Suit was commenced on June 9, 2020 by Mia Anderson as the Personal Representative of the Estate of Jessie Heyward Anderson a/k/a Jessie Bell Anderson ("Ms. Anderson") against Respondent Richard Miles Thompson, M.D. (an emergency room physician) and Respondent ACS Primary Care Physicians – Southeast, P.C. (his employer). Other parties were dismissed from the case before trial. Respondents' defense was essentially that Dr. Thompson did not commit malpractice. The case was tried before The Hon. Thomas Hughston and a jury on September 11 - 15, 2023. (R. pp. 4 - 7) [Form 4 Order]. The jury returned a verdict for Defendants on Friday, September 15, 2023 *id.* and was discharged that afternoon. (R. p. 819, lines 18 - 19) [Form 4 Order]. The trial court gave Appellant ten days to file post-trial motions. (R. pp. 160 - 161). The trial court entered a Form 4 order confirming the jury verdict and ending the case on Monday, September 18. Form 4 Order Ending Case. (R. pp. 4 - 7.) [Form 4 Order]. Appellant transmitted for electronic filing a Rule 59 post-trial motion on Monday, September 25, 2023. (R. p. 198) [NEF 1], but the clerk rejected the filing the following morning, September 26, 2023 (R.

p. 201) [REJECTION], and rescinded the filing. (R. p. 200) [RESCINDED]. That afternoon Appellant filed her post-trial motion electronically. (R. pp. 202 - 203) [Rule 59 Motion for New Trial and Memorandum;] The trial court denied the Rule 59 motion by order entered October 2, 2023 (R. p. 10) [Order Denying New Trial], and Appellant served a notice of appeal on October 31, 2023 (R. p. 204 - 205) [Notice of Appeal].

Respondents moved to dismiss this appeal on the basis that a late-filed post-trial motion does not stay the time to appeal and the notice of appeal was not served timely. On April 16, 2024, the Court of Appeals denied the motion with leave to the parties to include the issue in their appellate briefs.

Appellant's brief discusses alleged juror misconduct but none of the other issues mentioned in her post-trial motion.

ARGUMENTS

I. 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 moved to dismiss this appeal shortly after it was filed. (Respondent's Motion to Dismiss filed with this court on December 18, 2024). [Motion to Dismiss]. This Court denied the motion but stated, "Nothing in this order shall prevent the parties from arguing in their briefs the issue of the timeliness of Appellant's post-trial motions, and thus whether they stayed the time for serving the notice of appeal." (Order Denying Motion to Dismiss entered April 16, 2024).

Respondents renew that argument here.

Facts Related to the Timeliness of the Appeal

Shortly after the jury returned its verdict for Defendants and was discharged on Friday, September 15, 2023, the trial court on the record granted Appellant ten (10) days to make post-trial motions. (R. pp. 160 - 161). The transcript reads:

Ms. Seithel: Your Honor.

The Court: Yes.

Ms. Seithel: Can we have ten days ---

The Court: Sure, ten days for any posttrial motions.

Ms. Seithel: Thank you.

The Court: Ten days for any posttrial motions.

(R. p. 160, line 24 – p. 161, line 6).

The following Monday, September 18, 2023, the trial court entered into the South Carolina Electronic Filing System a Form 4 order reading:

> Disposition Type: Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered. It is ordered and adjudged: Statement of Judgment by the Court: This matter is on trial for the week of September 11, 2023. The Jurors found in favor of the Defendants. This order ends the case. So Ordered. s/T.L. Hughston, Jr.

Form 4 Order Ending the Case; (R. pp. 4 - 7).

When the trial court entered the Order Ending Case that Monday, the E-Filing System automatically generated a Notice of Electronic Filing ("NEF") and transmitted it to all counsel of record. (R. p. 7). [NEF 1], dated September 18, 2023. The entry of the order and the transmission of the NEF served as written notice to counsel of filing of the order ending the case. Rule 4(e), SC Electronic Filing Policies and Guidelines.

At 7:55 PM on Monday, September 25, 2023, Appellant transmitted a motion for new trial to the court using the E-Filing System. (R. p. 199). [NEF 1]. The Clerk automatically emailed a Notice of Electronic Filing to Respondents' counsel. *Id*. But, in accordance with the electronic filing system, Respondents' counsel only received the NEF and did not receive the motion itself. (Nor did Appellant email the motion to counsel outside the electronic filing system.) Had Respondents checked the Clerk's website for the motion that night, nothing would have been there because a filing is not available until it has been accepted by the clerk. Rule 4(d).

When the Clerk reviewed the filing the following morning, the clerk found that it contained personally identifiable information. So at 9:16 AM, the Clerk rescinded her NEF, saying:

The Notice below is RESCINDED
The filing was not filed.

(R. p. 200). [RESCINDED].

The Clerk simultaneously sent a "Rejection Notice" to Appellant reading:

> Your electronic filing, Re: Anderson, Jessie – (220) Medical Malpractice – Motion/New Trial, was rejected by Circuit Court.
>
> Reason(s) rejected: Dear Filer, Please redact personal information on Exhibit.[1] Thank you.

(R. p. 201). [REJECTION].

[1] Privacy concerns are so important to the General Assembly that including a social security number in a filing with the clerk of court (as in the Death Certification transmitted to the Clerk in this case) is a misdemeanor. SC Code § 30-2-331. And privacy concerns are even more important to the Judicial Department. Rule 41.2(a) of the South Carolina Rules of Civil Procedure states, "A person filing a document in paper or electronic format shall not include, or will redact where inclusion is necessary, the following personal identifying information." And then it lists social security numbers, home addresses of non-parties, and dates of birth. The Court can see that this sort of information was redacted when the motion, brief and exhibits were properly filed the following day. (R. pp. 191-197).

This notice complied with Rule 4(d)(2), which requires a clerk who rejects a filing to notify the E-filer of the rejection and the reason for the rejection. Most importantly, because of the rejection, Appellant's motion for new trial with memorandum and exhibits submitted on Monday did "not become part of the court record" (Rule 4(d)(2)), and it is not part of the Record on Appeal in this case. What is in the Record on Appeal in this case is what was filed on the eleventh day after the jury was discharged.

At 12:51 PM on September 26, the eleventh day after the jury was discharged, Appellant submitted to the Clerk through the E-Filing system a new motion for new trial with a supporting memorandum and exhibits, with personal information redacted. (R. p. 202; R. pp. 191 - 197) [Motion for New Trial, Memorandum]. The Clerk then marked the motion as having been filed at 12:51 PM on September 26. *Id.*

Despite having lost jurisdiction at the end of the day of September 25 (as discussed below), on October 2 the trial court denied the Motion for New Trial, stating:

> This case is before me on Plaintiff's Motion for a New Trial following a jury trial and a verdict for the Defendants. This was a well-tried case in which the attorneys did an excellent job of presenting their side. I have carefully considered the motion of the Plaintiff and respectfully decline to grant it. It is so ordered.

(R. pp. 10 - 11) [Order Denying New Trial].

Monday, October 18 came and went. October 18 was the thirtieth day after entry of the September 18 order ending the case. (R. pp. 4 - 7).

On October 31 Appellant served a Notice of Appeal. The Notice of Appeal reads:

> Appellant … appeals from a jury verdict entered in favor or Respondents Richard Miles Thompson, M.D. and ACS Primary Care Physicians – Southeast, P.C. on September 15, 2023. Pursuant to Rules 50 and 59, SCRCP Appellant filed post-trial motions on September 25, 2023, which the Hon. Thomas L. Hughston, Jr. denied in a Form 4 order on October 2, 2023. This appeal covers the jury verdict and the order referenced above.

(R. pp. 204 - 205). [Notice of Appeal].

Law and Argument

This court does not have jurisdiction to hear this appeal because the notice of appeal was served more than thirty (30) days after Appellant's receipt of written notice of entry of the order ending the case and because the untimely post-trial motion did not stay the time to serve a notice of appeal. (R. pp. 204 - 205).

Rule 203(a) requires a party intending to appeal to serve and file a notice of appeal. Rule 203(b)(1) provides that a notice of appeal "shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." It provides an exception in cases where post-trial motions have been made. The exception reads, "When a timely motion for judgment *n.o.v.* (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

Rule 59 reads:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State;***.
>
> (b) Time for Motion. **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**. ***.

Rule 59, SCRCP (emphasis added).

The Supreme Court has made it abundantly clear that the trial court loses power to alter or amend a final order if more than 10 days passes from the discharge of the jury and no Rule 59 motion is made. In *Overland, Inc. v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018), the Court wrote:

Rule 60(b) states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 59(e) does not have any "conditions stated" which would allow such an extension. Rather, Rule 59(e) states, "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."

We have previously held that the ten-day limit for serving a Rule 59(e) motion **is an absolute deadline**. In *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000), the circuit court entered a dispositive order on January 10, 1997. 339 S.C. at 493, 530 S.E.2d at 127. "Neither party filed a Rule 59(e), SCRCP, motion within the ten day period allowed by that rule." *Id.* Nevertheless, on February 10, the circuit court issued another dispositive order completely reversing itself from the January 10 order. We held,

> the trial judge's . . . order filed February 10, 1997, more than thirty days later, was patently untimely. Under Rule 59(e), SCRCP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative . . . . When no timely Rule 59 motion was made nor timely sua sponte order filed under Rule 59(e), the January . . . order "matured" into a final judgment. The order filed on February 10 was a nullity because the trial judge no longer had jurisdiction over the matter.

339 S.C. at 494, 530 S.E.2d at 128; see also *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (on appeal from an order entered just before the effective date of the Rules of Civil Procedure, holding the trial court lost the power to modify the final order after end of the term of court, and noted that under Rule 59(e) the trial court would have the power to alter or amend such an order for a ten-day period after entry of judgment).

In light of these authorities, we repeat that the ten-day deadline in Rule 59(e) is an absolute deadline. A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion, see *Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) ("It is clear . . . that the district court was without power to enlarge the time period for filing a Rule 59(e) motion."). The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, **and the aggrieved party's only recourse is to file a notice of intent to appeal.**

Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018) (emphasis added).

When Appellant failed to make a Rule 59 motion for a new trial by the tenth day after the jury was discharged, she lost that right, the trial court lost jurisdiction to hear any such motion, and the time to serve and file a notice of appeal was not stayed.

The issue then becomes whether an unsuccessful **attempt** to make a Rule 59 motion on the tenth day after the jury is discharged constitutes actually making the motion on the tenth day. And it does not.

Rule 4(e)(3) of the E-Filing Rules states that service of a motion is complete when it is transmitted in accordance with paragraph (e)(2) of Rule 4. When the motion is transmitted in accordance with that subparagraph, then the act of e-filing the motion is the same as serving it by mail. And it provides that the date of service is the date stated in the NEF as the "Official File Stamp". The subsection reads:

> **(3) Service Complete Upon E-Filing**. **Service** of a pleading, motion, or other paper by NEF subsequent to the summons and complaint or other filing initiating a case **is complete** at the time of the submission of the pleading, motion, or other paper for E-Filing, **provided** an NEF is transmitted by the E-Filing System **in accordance with paragraph (e)(2) of this Section**. 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. The NEF constitutes proof of service under Rule 5(b), SCRCP, and **the date of service shall be the date stated in the NEF as the "Official File Stamp."** ***

Rule 4, SC E-Filing Guidelines and Procedures, emphasis added.

The date stated in the NEF as the "Official File Stamp" of the Motion for New Trial is Tuesday, September 26, 2023 (Ex. F), the eleventh day after the discharge of the jury. (R. pp. 202-203). [Motion for New Trial and Memorandum].

Under our Electronic Filing Rules, merely transmitting a paper to the clerk does not constitute "filing." Such a transmission has to be in accordance with the policies and procedures of our Electronic Filing Rules and Guidelines. Rule 4 reads:

> **(a) Electronic Filing.** The electronic transmission of a document to the E-Filing System **in accordance with these Policies and Procedures and the Filer Interface User Guide** constitutes the filing of that document in accordance with Rule 5(e), SCRCP. ***.

Rule 4(a), emphasis added. The Rule goes on to provide:

> **(b) Official Record.** Where a document is E-Filed, the electronic version of that filing constitutes the official record. E-Filed documents have the same force and effect as documents filed by Traditional means. ***.
>
> **(c) Timeliness.** 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.** 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.)

Rule 4 goes on to read:

> **(d) Clerk Review.** The Clerk of Court shall promptly review an Electronic Filing to determine whether it conforms to applicable filing requirements.
>
> > **(1) Acceptance.** If the Clerk of Court accepts the document, the document shall be considered filed with the court at the time the original submission to the Electronic Filing System was complete in accordance with paragraph (c) of this Section, and the Electronic Filing System will affix the date and time of receipt to the document. Upon acceptance, the Electronic Filing System will issue a confirmation with the date and time of the original submission. ***.
> >
> > **(2) Rejection.** If the Clerk of Court rejects the document, the document shall not become part of the court record. The Clerk of Court will notify the E-Filer of the rejection and the reason for rejection, which the E-Filer may access in the E-Filing System under the "My Filings" Tab. In the event an NEF was transmitted at the time of submission, a new NEF will be sent to all E-Filers in the case informing them that the document was rejected by the Clerk of Court**, and the previous NEF shall not be effective as proof of service.**

> 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, such as when the clerk of court erroneously rejected a filing or where a rejection was based on improper formatting.

(Emphasis added.)

So the electronic transmission to the clerk of court of the rejected motion for new trial did not constitute filing.

Nor did it constitute service.

Rule 4(e) **Electronic Service** provides:

> **(2) Automatic Service of Other Papers on Authorized E-Filers by the E-Filing System.** Except as provided in sub-paragraphs (A) and (B) below, upon the E-Filing of any pleading, motion, or other paper subsequent to the summons and complaint or other filing initiating a case, the E-Filing System will automatically generate and transmit an NEF to all Authorized E-Filers associated with that case. Where the parties are proceeding in the E-Filing System and a pleading, motion, or other paper must be filed, made, or served under the SCRCP, the E-Filing of that pleading, motion, or other paper, together with the transmission of an NEF, constitutes proper service under Rule 5, SCRCP, as to all other parties who are E-Filers in that case. It is the responsibility of an E-Filer to review the content of the E-Filed document in the E-Filing System to determine its force and effect.
>
> ***
>
> **(3) Service Complete Upon E-Filing. Service of a** pleading, **motion**, or other paper by NEF subsequent to the summons and complaint or other filing initiating a case **is complete at the time of the submission** of the pleading, motion, or other paper for E-Filing, **provided an NEF is transmitted by the E-Filing System in accordance with paragraph (e)(2) of this Section**. 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. The NEF constitutes proof of service under Rule 5(b), SCRCP, and **the date of service shall be the date stated in the NEF as the "Official File Stamp."** Where notice of the filing of a pleading, motion, or other paper is served by an NEF, the E-Filer need not file proof of service, but the E-Filer must retain a copy of the NEF as proof of service.

Rule 4(e)(2) and (4) (emphasis added).

To reiterate, the Rule provides that service of a motion is complete at the time of its submission for E-Filing once the filing has been accepted. Rule 4(d)(1).

Appellant cannot rely on the next sentence of Rule 4, either ("The act of E-Filing the … motion… is the equivalent of depositing it in [the mail]") because the motion was not in fact E-Filed until Day 11.

The Rule reiterates this concept by stating, "The date of service **shall be** the date stated in the NEF as the "Official File Stamp." (Emphasis added.) In this case, the date stated in the Official File Stamp is September 26, the eleventh day after the jury was discharged. (R. pp. 202 - 203). Motion to Dismiss.

By the time the motion for new trial was actually made at 12:51 PM on September 26, the trial court had lost jurisdiction to hear such a motion, and Appellant's only recourse was to file a notice of appeal within 30 days of receipt of written notice of entry of the final judgment. That deadline expired on Wednesday, October 18, 2023. The Notice of Appeal was not served until October 31, thirteen days late. (R. pp. 204 - 205). [Notice of Appeal].

As with motions for a new trial, the service of a notice of appeal is jurisdictional:

> The requirement of service of the notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

A couple of additional points.

Just last year the Supreme Court issued *Eberly v. Advanced Flooring & Design Div of ISI, LLC*, 442 S.C. 656, 901 S.E.2d 273 (2024), a case dealing with whether service via the Electronic Filing System constituted sufficient service under the court rules existing at the time. Recognizing confusion on the issue, it held it did constitute sufficient service and issued an amended order

under Rule 262 SCACR to state that E-Filing is a permissible method of service for a notice of appeal. The case does not deal with the issue we have here, which is whether the transmission of a motion under the Electronic Filing System constitutes service where the motion is not served on the opposing party and the motion is rejected for filing by the Clerk because the filing would violate privacy laws.

A final point is that the South Carolina Judicial Department "carefully examined" the more lenient federal electronic filing system and ultimately rejected it for three distinct reasons:

1) The state's system "was not capable of substituting one document for another and retaining the same date and time stamp";

2) "It was believed that attorneys would be strongly opposed to granting Clerks of Court the power to alter a time stamp"; and

3) Such a system ensures that documents that are timely submitted are deemed timely served and filed, regardless of whether they are reviewed and formally accepted by the clerk of court that day or on a subsequent day.

See FAQS at www.sccourts.org/efiling/FAQs.cfm under "Summary of E-Filing Public Comments and Responses"

Because a late-filed post-trial motion does not stay the time to file a notice of appeal, and because Appellant did not serve her notice of appeal within 30 days of receipt of written notice of entry of the order ending the case, this appeal should be dismissed.

II. Appellant has not stated concisely and directly any issue for review.

Facts:

Appellant has only stated the following issue on appeal:

> Whether the lower court erred in its handling of revelations regarding premature deliberations and juror hostility.

(Appellant's Initial Brief, p. 1).

Argument

Rule 208(b)(1)(B) requires an appellant to present a "Statement of Issues on Appeal," where each issue is stated concisely and directly. The rules reads:

> **Rule 208 Initial Briefs**
> **(b) Content.** The initial briefs under this Rule and the final briefs under Rule 211 shall contain:
>
> (1) Brief of Appellant. The brief of appellant shall contain under appropriate headings and in the order here indicated:
>
> (B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

Here, Appellant does not identify a particular error the trial court made, merely claiming the court erred in its "**handling** of revelations regarding premature deliberations and juror hostility." (Appellant's Initial Brief, p. 1). She doesn't even state the court erred in denying her motion to remove a particular juror or to question her. She does not present that as an issue presented for review because, despite her implication to the contrary at the bottom of Page 7 of her brief, she never asked the court to do either. (Appellant's Initial Brief, p. 7). *See infra* at Pg. 21.

This court will forgive an appellant's failure to provide a concise and direct statement of issues on appeal, but only if the party's argument is nonetheless "reasonably clear." *Gibson v. Ameris Bank*, 420 S.C. 536, 804 S.E.2d 276 (Ct. App. 2017); *Eubank v. Eubank*, 347 S.C. 367, 373 n. 2, 555 S.E.2d 413, 416 n. 2 (Ct. App. 2001); and *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985). The Statement is vague and precise, we submit, because Appellant never in fact made a clear motion, never objected to the

trial court's curative instructions not discuss the case until told to do so, never asked the court to hold an evidentiary hearing where the court could voir dire jurors or either of the other two court officials involved, never asked the court to state for the record what the court itself heard or saw, and never made a clear motion for a mistrial or to release or question a particular juror.

III. Appellant did not preserve any of the issues she raises on appeal.

Background Facts

Ms. Anderson was seen by Respondent Dr. Thompson in the Emergency Department of Trident Medical Center in Moncks Corner, SC, on April 12, 2016 complaining of pain in both of her legs. (R. p. 71, lines 10 - 17). Dr. Thompson took a history from Ms. Anderson and listened to her symptoms, reviewed what he had of her medical record, ordered tests and reviewed the results, and examined her. (R. pp. 67 - 72).

Significant to Dr. Thompson's defense is that he ruled out the possibility that she had blood clots in her legs. (R. p. 66, lines 3 - 10). Dr. Thompson ruled out that possibility because while Ms. Anderson said both of her legs hurt equally (R. p. 71, lines 17 - 18), neither was swollen (R. p. 72, lines 18 - 22). "I do not think that it is any way possible or reasonable to think that somebody can have a bilateral clot through their pelvis and legs and not have swelling from that." (R. p. 71, lines 22 - 25). "Almost never does a patient present with a [clot] in both legs at the same time unless the patient is bedbound or paralyzed." (R. p. 70, line 24 – p. 217, line 9). She had a mildly elevated heart rate (R. p. 74, lines 2 - 16), but it normalized during the visit. (R. p. 74, line 23 – p. 75, line 5). She didn't report being dizzy or lightheaded that day. (R. p. 123, lines 7 – 12). She was not having shortness of breath or chest pain, and her oxygen level was 100%. (R. p. 74, lines 17 - 22). She didn't have any symptoms that would suggest "anything dangerous." (R. p. 74, lines 17 - 19). "It was very clear then and very clear now that she had a long history of chronic pain just like this.

There was absolutely nothing about her presentation that said this is a [clot]." (R. p. 82, lines 14 - 18). Based on these findings, Dr. Thompson discharged Ms. Anderson with instructions and prescriptions. (R. p. 88, lines 12 – 20).

Appellant's expert was a hematologist (R. p. 101, lines 8 – 9) who has never practiced emergency medicine since completing a rotation as a resident. (R. p. 114, lines 1 – 5). He opined that Dr. Thompson should not have sent Ms. Anderson home from the emergency department. (R. p., lines 15 – 17).

The next day Ms. Anderson was taken by ambulance to Roper St. Francis Berkeley Hospital and pronounced dead. Appellant blamed Dr. Thompson, and her hematologist expert opined that Ms. Anderson in fact had a blood clot in her legs, that the clot broke free, and that the clot caused a pulmonary embolism that caused her death. (R. p. 103, line 23 – p. 104, line 10). Dr. Thompson, on the other hand, and his expert witnesses testified that he (Dr. Thompson) upheld the standard of care in treating Ms. Anderson and did not cause or contribute to her death. (R. pp. 71 – 75) (Dr. Thompson); *et seq.* (Dr. Carter - expert in emergency medicine); (R. p. 147) *et seq.* (Dr. McCrae – expert in trauma surgery and critical care medicine); and (R. p. 154, lines 20 – 24) (Dr. Scott – expert in emergency medicine)].

As indicated above, the jury returned a verdict for the defense. (R. p. 159, lines 16 – 21).

Facts Related to Allegations of Juror Misconduct

Appellant points to three episodes during the trial for which she contends she is entitled to a new trial: An alleged insult the forelady is said to have made to the trial judge (R. pp. 104 *et seq.*); A comment made by an unknown juror suggesting he might discuss the case (*Id.);* and eyerolling and eye daggers said to have been shot at all counsel by the forelady (R. pp. 119 *et seq,*).

Alleged Insult: After the luncheon recess on the third day of the trial, the trial court reported:

> THE COURT: There was some negative reaction from some of the jurors, rather inappropriate language and so forth, contrary to my instructions, you know. *** But apparently the jury does not like the fact that I told them not to discuss the case, even amongst themselves, you know. I should have told them that at the very start of the case, But I told them, of course, not to discuss with anybody, you at home or anything like that. But I would have included that instruction early, but I know I didn't at some point in time tell them not even amongst themselves.
>
> Of course, the reason for that is they haven't heard everything, and they shouldn't be trying to make a decision based on part of the testimony or evidence. Of course, they ought to consider it, take it in and listen to it, retain and everything, evaluate and everything. But as far as making any decisions are concerned, that's for them to do at the conclusion of the case when they've heard from everybody.

(R. p. 105, line 4 – p. 106, line 5).

The trial court then called the Clerk of Court to the stand. She testified:

> THE WITNESS: Berkeley County Clerk of Court.
>
> THE COURT: All right: And tell us what's been reported to you by people that are associated with the court operation.
>
> THE WITNESS: Your Honor, at the lunch break, my courtroom manager came to me, and she reported to me something she thought I needed to be aware of, that the officer in the courtroom overheard.
>
> THE COURT: And tell us what that was.
>
> THE WITNESS: That when you dismissed them for a break, the forelady stood up. You admonished them to not discuss the case, she stood up and said –
>
> THE COURT: She said something about the …
>
> THE WITNESS: She said, “F you" in the courtroom. The officer overheard her, and they went in the jury room ….

(R. p. 107, lines 1 - 17) (truncated to separate the insult from the comment about juror discussions).

The Clerk reported that the Courtroom Officer said the insult was addressed to the trial judge. (R. p. 109, lines 1 – 5).

Alleged comment about juror discussing the case: As part of the same testimony, the Clerk of Court went on to say (with some overlap for context):

> THE WITNESS: *** The [courtroom] officer overheard her, and they went in the jury room and someone -- one of the jurors in the jury room was heard, "I'll discuss this case, if I want to. What is he going to do to me, throw me in jail?" And I felt that it was important, I needed to bring it to your attention.

(R. p. 107, lines 16 – 22).

The Clerk was unable to say whether the person who made the comment in the jury room was male or female (R. p. 109, lines 7 – 12), since the Clerk said she heard it from the Courtroom Manager, who said she heard it from the Courtroom Officer (R. p. 107, lines 6 – 9), who apparently did not say whether the speaker was male or female.

The trial court decided to treat the issue with the same level as counsel had: The court told counsel it intended to admonish the jury "again about discussing the case, even amongst themselves, in as strong a language that I can … *and see where it goes from there*." (R. p. 109, lines 15 – 20). (emphasis added).

Appellant responded with the following:

> MR. JEKEL[2]: **If** they have begun deliberating or discussing the case, I think that's completely inappropriate. Either way, they might be in our favor; they might be in their favor. But I don't think you can go on with the jury, **if** they've already started deliberating.
>
> THE COURT: Well, I appreciate that, but I'm going to admonish them and hopefully remove that from any further anticipation in the case. I'm going to do the best I can to keep this trial going.
>
> MS. SEITHEL[3]: Your Honor, I'm wondering if there's anything that you can do to try to [ferret] 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.

[2] Counsel for Plaintiff/Appellant
[3] Also counsel for Plaintiff/Appellant

MS. MASON[4]: We would agree.

MS. SEITHEL: You and I have not been on the same page, and I never once ---

THE COURT: I don't want to say anything about that, but anyway I appreciate that, you know. But I'm going to bring the jury out here, and I'm going to see if we can go on, you know. **You can renew your motions**; **you can make more motions, if you want to, you know, later on in the case, you know**, but I'm going to see if I can keep it going at this point.

(R. p. 109, line 23 – p. 110, line 23) (emphasis added).

The court then admonished the jury not to discuss the case until instructed to do so. (R. p. 111, line 8 – p. 113, line 13].

Later in this brief we will discuss what did *not* happen at that point.

Alleged eyerolling and eye daggers: After the witness completed his testimony, Appellant's counsel reported that she had "a small issue that we would like to address with you---." (R. p. 117, lines 10 – 11). She reported that she and counsel for Respondents were in agreement that while the court was giving its instructions and as the witness was called back to the stand, "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 as Ms. Ballentine proceeded with her question, 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." (R. p. 117, line 25 – p. 118, line 10). Counsel for Respondents agreed. (R. p. 118, line 11). Counsel for Appellants then said, "And it's very – I think it taints the entire jury; I think that it taints the entire process." (R. p. 118, lines 12 – 14). Respondents' counsel and she agreed it was "Very disruptive" and "distracting." (R. p. 118, lines 16 – 19). Respondents' counsel agreed to release the forelady, "**if** the court – **if** Your Honor agrees." (R. p. 118, lines 20 – 23) (emphasis added).

[4] Counsel for Respondents

The court then asked:

> So, as I understand – what you're telling me is both of y'all want me to remove the foreperson from the jury?

(R. p. 118, line 24 – p. 119, line 1). And of upmost importance is the response of Appellant's counsel, who wanted to keep her options open. She said, "Or check in with her, because something is different today with her than yesterday and the day before." (R. p. 119, lines 2 – 4).

The trial court responded by noting from his observation that the forelady was paying particular attention and in fact had tried to ask a question but withdrew it when she found it had been answered. (R. p. 119, lines 5 – 22). The court announced it was:

> Not making a final decision about it at this point, but I'm not going to take her off right now and everything, I'm going to again at the end of – later on, again admonish the jury about what they are to do and not do and so forth and everything, you know. And I certainly will take that into consideration before we submit the case to the jury after closing and everything, and will make a final decision about that then. But right now, I'm not going to take her off right now.

(R. p. 120, lines 6 – 16).

And here we list what did not happen as a result of either episode:

Appellant did not object to anything the trial court did or said and certainly did not object clearly. The closest Appellant came to complaining about an alleged insult occurred when she said:

> I mean, I think it's completely inappropriate for anyone on that jury to use "F you," especially towards Your Honor."

(R. p. 110, lines 11 – 13).

The closest Appellant came to complaining about the comment made back in the jury room occurred when her lawyer said:

> **If** they have begun deliberating or discuss the case, I think that's completely inappropriate. Either way, they might be in our favor; they might be in their favor. But I don't think you can go on with the jury, **if** they've already started deliberating."

(R. p. 110, line 23 – p. 111, line 3). (emphasis added.)

Appellant did not ask for an evidentiary hearing or for a factual determination of whether the jury had begun deliberating, and she did not object to how the trial court, exercising its discretion, decided to deal with the issue (with an admonition not to discuss the case, even among themselves, until they had heard all the evidence, seen everything present, heard the lawyers with their opening statement, their argument to the jury, and the court's instructions on the law). (R. 111, line 22 – p. 112, line 3).

Appellant never asked that the forelady be dismissed. When the court asked if "both of y'all want me to remove the foreperson from the jury," she did not say, "Yes, Your Honor. We move that the foreperson be removed from the jury." Instead she said:

> MS. SEITHEL: Or check in with her, because something is different today with her than yesterday and the day before.

(R. p. 119, lines 2 - 4).

Appellant then withdrew her concerns about the presence of the forelady on the jury when she said, "We just wanted to bring that to your attention." (R. p. 120, lines 19 – 20).

Appellant never asked the court for a final ruling after the court had said it was "not making a final decision on it at this point." (R. p. 120, lines 6 – 16).

Appellant did not ask the trial court to state what it heard regarding the alleged insult.

Appellant never asked the court to ask the Clerk of Court any additional questions (other than whether the person who uttered the insult was the same person who said she would discuss the case if he or she wanted to).

Appellant did not object to the court's curative instructions.

Appellant did not offer her own proposed curative instruction.

Appellant never asked for an evidentiary hearing where the Courtroom Officer or the

Courtroom Manager could be questioned under oath about their first-hand knowledge of any alleged insult or the suggestion that a juror might discuss the case.

Appellant never asked that the forelady be questioned during an evidentiary hearing about any alleged juror misconduct. The statement on Page 7 of Appellant's brief that the trial judge declined to question the forelady (citing R. p. 120, lines 6 – 9) is simply not true: Appellant never asked the court to question her. (Appellant's Brief, p. 7).

Appellant never moved for a mistrial, only coming close when as we stated before, her lawyer said, "I don't think you can go on with the jury "[**if]** they have begun deliberating" or **if** they've already started deliberating." (R. p. 110, lines 1 – 3) emphasis added.

Appellant never asked anybody (the court, the Clerk of Court, the Courtroom Manager, the Courtroom officer, or any juror) whether the juror in question had actually discussed the case with anyone. In fact, there is no evidence at all that this unknown juror did actually discuss the case with anyone prematurely.

At the end of the testimony *the defense* renewed its motion to remove the forelady (R. p. 157, lines 4 – 7), but Appellant did not join in the motion (*id.*), despite Appellant's suggestion to the contrary. (Appellant's Brief at p. 7). Appellant did not take the court up on its offer to reconsider the continued participation of the forelady after closing arguments. See (R. p. 158, line 13 – p. 159, line 6). The alternates were excused (R. p. 159, line 7) and a verdict returned by the original jury. (R. p. 159, lines 15 – 20).

Argument and Law on Error Preservation

General Error Preservation Rules

Generally speaking, an appellate court will only consider issues that were first fairly and properly raised to the lower court and passed upon by that court. *Hubbard v. Rowe*, 192 S.C. 12,

5 S.E.2d 187 (1939). Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him. *Price v. Pickens County*, 308 S.C. 64, 416 S.E.2d 666 (Ct. App 1992), citing *Roche v. S.C. Alcoholic Beverage Control Commission,* 263 S.C. 451, 211 S.E.2d 243 (1975).

In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court; (2) raised by the Appellant; (3) raised in a timely manner; and (4) raised in the lower court with sufficient specificity. Jean Hoefer Toal *et al., Appellate Practice in South Carolina* 185 (3rd ed. 2016), citing *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007); *See also State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018), to the same effect.

It is not fair to trial courts for counsel to make a weak, imprecise objection and hold it as "an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 893 S.E.2d 342 (Ct. App. 2023).

As we all know, "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct App. 1984, *op. quashed on entirely different grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985)).

Failure to Object to Allegations of Pre-verdict, Intrinsic Juror Misconduct

A case quite similar to this is *State v. Chhith-Berry*, 437 S.C. 527, 878 S.E.2d 352 (Ct. App. 2022). There, during the State's case-in-chief, the bailiff told the trial court that the jury had been participating in premature deliberations. (The fact that jurors had participated in premature

deliberations was not contested.) The trial judge's response was to give a curative instruction to the jury that is exceedingly similar to the ones given here: That jurors were not allowed to discuss the case in any fashion among one another, even on breaks, they needed to follow the court's instructions, and they are not to discuss the case until they had received all of the testimony, all the evidence in the record, and the court's instructions on the law. The trial judge reiterated what he had just said by saying, "So don't discuss the case. You can talk about the weather, you can talk about [the bailiff], you can talk about him, whatever you like, but not about the case." *Chhith-Berry* at 538.

And there, just like here, the appellant did not object to the instruction or move for a mistrial and did not renew his motion for a mistrial at the conclusion of the State's case. One of his grounds for appeal was that the trial court erred by failing to grant his motion for a mistrial because he was prejudiced by premature jury deliberations. The Court of Appeals affirmed the conviction with the following:

> Our supreme court "ha[s] routinely held that a party must object at the first opportunity to preserve an issue for review. (Citing *State v. Aldret*, 333 S.C. 307; 509 S.E.2d 811 (1999): "In light of [the defendant's] failure to call the alleged juror misconduct to the trial court's attention at his first opportunity to do so, we hold he is procedurally barred from raising the issue."); *see also State v. Vang,* 353. S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003) (finding that the defendant failed to preserve for appellate review his contention that the trial court should have questioned each juror to determine whether premature deliberations had occurred because he did not object to the trial court's ruling or contemporaneously request individual questioning of the jurors). Additionally, "appellate court[s] will not consider any fact which does not appear in the [r]ecord on [a]ppeal." Rule 210(h), SCACR.

Chhith-Berry at 364.

The Court of Appeals also noted:

> [Appellant] knew premature jury deliberations had allegedly taken place because the trial court gave a curative instruction, yet [appellant] did not object to the trial court's curative instruction, request that the trial court question the jury regarding

> premature deliberations, or move for a mistrial. Instead, [appellant] waited until after the jury submitted its guilty verdict to raise the issue in a posttrial motion.

Id.

As a result, the Court of Appeals concluded the issue was not preserved for appellate review and affirmed the trial court.

The *Vang* case cited in *Chhith-Berry* is helpful, too. There, during the trial, the foreperson sent a note to the court that led to the court questioning him in chambers about possible bias against Asians. The court announced that the foreperson had indicated twice that comments about "the Oriental family" were not the result of members discussing the evidence in the case. The court shared the results of the questioning with counsel, and they said they were satisfied. On appeal, the appellant took the position that the court should have questioned all of the jurors individually. The Court of Appeals ruled that the issue was not preserved for review.

Vang and *Chhith-Berry* are based on *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), a case involving the discovery of allegedly prejudicial jury misconduct after the verdict was returned. As part of dealing with the appellant's claim that the misconduct was discovered during the trial itself, the Supreme Court wrote that had it been so discovered and *had 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." The Supreme Court then laid out two rules: (1) jury misconduct in the form of premature deliberations does not warrant automatic reversal, and (2) the burden is on the defendant to demonstrate that such deliberations affected the jury's verdict. *Aldret* at 313.

As for the particular issue involving the failure of the court to dismiss the forelady, we would point out that an appellant has not preserved an issue for appeal if it was another party who raised the objection. *Tupper v. Dorchester County*, 326 SC 318, 487 S.E.2d 187 (1997) (citing

Brock v. Board of Adjustment, 308 S.C. 539, 419 S.E.2d 773 (1992), and 4 C.J.S. *Appeal and Error* § 251 (1957)), and explaining that an appellant cannot bootstrap an issue for appeal by way of a co-defendant's objection); *State v. Lemire*, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013); and *State v. Ward,* 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007). As noted, it was Respondents and not Appellant who objected to the continued presence of the forelady at the very end of the trial. Appellant was apparently willing to take her chances with her.

Failure to Ask for an Evidentiary Hearing.

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. *State v. Zeigler,* 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). Nor do we contest that where an allegation of improper internal influence potentially affects fundamental fairness, the court may accept juror testimony to ensure due process. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007).

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. In *Zeigler*, allegations of juror misconduct arose during deliberations. The appellants there presented statements (rather than affidavits) describing the misconduct, and the trial court accepted them as if they were affidavits and then denied their motion for new trial. The Court of Appeals affirmed based on the appellants' failure to present sworn affidavits.

Appellants here have the same problem: They did not ask for more of an evidentiary hearing than they got, and the Clerk's third-hand testimony is not sufficient to support a conclusion that misconduct actually occurred.

Appellant cites *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996), for the proposition found in *Zeigler* that a trial court must inquire into issues of juror misconduct. But 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, and, because of our time-honored issue preservation rules, *Hurd* does not help Appellant.

IV. The trial court did not abuse its discretion

Standard of Review

The question of the impartiality of a juror is addressed to the discretion of the trial judge. *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000). *See also State v. Loftis*, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors).

The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial judge is in the best position to determine the credibility of the jurors, so our appellate courts grant it broad deference on the issue. *Id.* (citing *State v. Johnson*, 248 S.C. 153, 149 S.E.2d 348 (1966) (the question of the impartiality of a juror is addressed to the discretion of the trial judge); *State v. Loftis*, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors).

Law and Argument

A mistrial should only be granted when **absolutely necessary**. *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000). In order to receive a mistrial, the defendant must show error and

resulting prejudice. *Id.* We would emphasize here that if there's no error and no prejudice, there's no abuse of discretion.

Assuming Appellant has gotten past the issue of error preservation, she has to prove misconduct in fact, and then she has to prove she was harmed by it. And then she has to show the trial court abused its discretion in proceeding with the trial with curative instructions. She has not done that.

In *State v. Barroso*, 320 S.C. 1, 462 S.E.2d 862 (Ct. App. 1995) *rev'd on other grounds*, 328 S.C. 268, 493 S.E.2d 854 (1997) but cited with approval in *Aldret)*, the Court of Appeals suggested that, in the absence of judicial encouragement of premature deliberations, a curative instruction might suffice where a jury is suspected of premature deliberations. The trial court here never "encouraged premature deliberation," and the trial court discouraged them with appropriate curative instructions. The court explained its reasoning, and the court's discretion was not abused. (R. p. 109, lines 15 – 20; R. p. 111, line 8 – p. 113, line 13).

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CONCLUSION

The order of the lower court ending the case should be affirmed because the notice of appeal was filed late, no appealable issue is stated concisely and directly, the appeal raises issues not presented to the lower court, and Appellant got a fair trial.

All of which is respectfully submitted.

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