THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Daniel D. Hall, Circuit Court Judge

Op. No. 6096
(S.C. Ct. App. filed January 15, 2025)
Case No. 2016-CP-46-3181

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S.C. SUPREME COURT

Rita Pratt, Individually and as the Personal Representative of the Estate of William Pratt, Deceased,..... Respondent,

v.

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center; Jaleesa Heyward, RN; South Carolina Emergency Physicians, LLC; Jonas Varaly, DO; Rock Hill Radiology Associates, LLC; and Geoffrey T. Gilleland, MD, ... Defendants,

Of Which, Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, MD are ..... Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, M.D. certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on February 19, 2025.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the denial of the Petitioners' directed verdict and JNOV motions as to the survival claim and loss of consortium claim where the jury's verdict clearly demonstrates that the Respondent failed to prove the element of proximate cause?

II. Did the Court of Appeals err in affirming the denial of a new trial absolute where the jury's verdict was ambiguous and strongly indicative of juror confusion?

III. Did the Court of Appeals err in affirming the denial of the Petitioners' directed verdict and JNOV motions on the issue of recklessness or conscious indifference?

IV. Did the Court of Appeals err in affirming the denial of the motion for new trial absolute where the verdict of $640,000 on the loss of consortium claim is unsupported by the evidence and is grossly excessive?

V. Did the Court of Appeals err in affirming the jury's allocation of fault between the Petitioners and in upholding an allocation of ten percent fault to the practice which may only be held vicariously at fault?

VI. Did the Court of Appeals err in failing to order that the verdict be reduced based on the non-economic damages cap of $431,865.00?

VII. Did the Court of Appeals err in failing to grant a set-off for the Amisub settlement based on the allocations announced to the trial court when the settlement was placed on the record but rather allowed the Respondent to alter those allocations after knowing the jury's verdict?

STATEMENT OF THE CASE

This is an appeal from a medical malpractice case. On October 28, 2016, the Respondent Rita Pratt, individually and as the Personal Representative of the Estate of William Pratt, filed a Complaint against the Petitioners Geoffrey T. Gilleland and Rock Hill Radiology Associates, LLC. The Complaint includes causes of action for wrongful death, survival, and loss of consortium. (R. 28-29). The Respondent alleges that the Petitioners were negligent in "failing to notify Mr. Pratt's treating physicians of the concerning CT Scan results." (R. 27). The Respondent further alleges that "Dr. Gilleland was acting within the course and scope of his employment and/or agency relationship with Rock Hill Radiology." (R. 25-26).

By Order filed March 6, 2017, the trial court consolidated this action with another action brought by the Respondent against the Defendants Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Amisub"); Jaleesa Heyward, RN; South Carolina Emergency Physicians, LLC; and Jonas Varaly, D.O. (R. 18-19).

After the completion of discovery, the case proceeded to trial on February 3, 2020, before Circuit Court Judge Daniel D. Hall and a York County jury. The Petitioners moved for a directed verdict at the close of the Respondent's case-in-chief and at the close of the evidence. During the trial, the Defendant Amisub reached a settlement with the Respondent in the amount of $250,000. (R. 7-11, 565). On February 10, 2020, the jury returned a verdict in favor of Dr. Varaly on all claims, in favor of the Petitioners on the wrongful death claim only, and in favor of the Respondent on the survival and loss of consortium claims. The jury allocated fault as ninety percent to Dr. Gilleland and ten percent to Rock Hill Radiology. The jury awarded actual damages of $360,000 on the survival claim and $640,000 on the loss of consortium claim. (R. 3-5).

The Petitioners thereafter filed post-trial motions including for judgment notwithstanding the verdict (JNOV), or alternatively, a new trial absolute. In the alternative, the Petitioners also moved for a set-off of the settlement reached by the Respondent with Amisub during the trial and a reduction of the verdict based upon the cap on non-economic damages in accordance with S.C. Code Ann. § 15-32-220. (R. 52-65).

The trial court did not hold a hearing on the post-trial motions. Instead, the trial court issued a Form Order filed May 4, 2020, denying the JNOV and new trial absolute motions. The trial court granted a set-off of $83,333.33 each for the survival claim and the loss of consortium claim. (R. 12-14). The Petitioners then filed a Rule 59(e) motion. (R. 125-129). After a hearing held on June 11, 2020, the trial court issued a Form Order on July 6, 2020, denying the Rule 59(e) motion. (R. 15-17).

The Petitioners thereafter filed a timely appeal to the South Carolina Court of Appeals. On January 15, 2025, the Court of Appeals issued a published opinion affirming the trial court's denial of all post-trial motions. The Petitioners filed a petition for rehearing which was summarily denied by the Court of Appeals by order issued February 19, 2025.

The Petitioners now seek a writ of certiorari in this Court.

STATEMENT OF FACTS

In 2014, the decedent William Pratt was diagnosed with liver cancer, and by September 2014, he had been diagnosed with Stage IV carcinoma with metastasis into the adrenal gland. (R. 26, 263, 242). The decedent also had a history of Hepatitis C and cirrhosis. (R. 349, 583). He also had a diagnosis of a compression fracture at C-2 in his cervical spine. (R. 284, 858).

The decedent and his wife, Rita Pratt, who were Florida residents, were visiting and staying with their daughter in Rock Hill, South Carolina in March 2015. In the early morning hours of March 2, 2015, the decedent fell down a flight of stairs. (R. 26). The only visible injury was a laceration to the head. (R. 858-859). He was transported by ambulance to Piedmont Medical Center. He was seen in the Emergency Department by the Defendant Jonas Varaly, D.O., complaining of rib pain and head pain. (R. 521).

The CT scans of the cervical spine, chest, and brain were initially read by Virtual Radiology as negative. Subsequent readings by the radiology staff as to the cervical spine and head were the same. (R. 878-881). The Petitioner Geoffrey Gilleland read the chest CT scan as showing nine non-displaced rib fractures. He also noted metastatic sternal lesion and emphysema and a large adrenal mass. Dr. Gilleland's reading was reported at 8:22 a.m. (R. 879-880). The decedent had been discharged at 6:52 a.m. (R. 865). He had been given a prescription for Percocet with instructions to follow up with Carolina Ortho Surgery Associates within two to three days. Dr. Gilleland's reading of nine non-displaced rib fractures was placed in the records but was not called in to the Emergency Department. While referred to as rib fractures, it is undisputed among the parties that there were no cracks in any rib, no fracture lines

in any rib, no breaks or separation in any cortical line of any rib, and no bone separation in any rib. (R. 204-207).

The decedent spent the next 36 hours at his daughter's home on the sofa. On the morning of March 4, 2015, he was seen at the Emergency Department at Carolinas Medical Center-Pineville complaining of difficulty walking, chest pain, and back pain. (R. 581). A chest CT scan on March 4th reported non-displaced bilateral antral lateral rib fractures with no evidence of underlying pneumothorax or pleural effusions. A CT scan of the lumbar spine on that same date revealed an acute fracture of the L-1 vertebral body with approximately 30% loss of vertebral body height. (R. 579). A CT scan of the chest on that same date showed that his lungs were hypoventilated with resulting aspiration that resulted in mild to moderate bibasilar vascular atelectasis. A later CT scan of the chest on March 4th showed no pneumothorax or pleural effusions. (R. 381-383). The decedent was transferred to Carolinas Medical Center. There was no mention on his admission of pneumonia. Pneumonia was diagnosed on the evening of March 7, 2015. (R. 385). Thereafter, on March 16, 2015, the decedent went into respiratory distress followed by renal failure. He was discharged to palliative care on March 21, 2015, where he passed away on March 23, 2015. (R. 27).

ARGUMENTS

I. The Court of Appeals erred in affirming the denial of the Petitioners' directed verdict and JNOV motions as to the survival claim and loss of consortium claim where the jury's verdict clearly demonstrates that the Respondent failed to prove the element of proximate cause.

As her theory of liability, the Respondent alleges that the Petitioners were negligent for Dr. Geoffrey Gilleland's failure to call in the discrepancies he found when he overread the decedent's chest CT scan and noted non-displaced rib fractures on March 2, 2015. The Respondent contends a reporting of those discrepancies should have resulted in the decedent being hospitalized on that day. Most importantly, the jury ultimately returned a defense verdict on the wrongful death claim. (R. 4). The Respondent's theory of liability was that the decedent developed pneumonia because of the delay in hospitalizing him and the pneumonia then proximately caused his death. (R. 384-385). On the verdict form, the jury returned a monetary amount for the survival action and the loss of consortium claim, but then left the wrongful death action as blank. The jury did not even place zero dollars in that space. (R. 4). Thus, with its defense verdict, the jury actually found that the Petitioners' breach of the standard of care *did not result in the decedent's death*. Moreover, it logically follows that the Petitioners' alleged negligence did not cause the pneumonia that resulted in his death.

There is no other logical way to interpret the defense verdict on the wrongful death claim. In the trial court, the Respondent posited that the defense verdict on the wrongful death claim could be explained by suggesting that the jury concluded that the Respondent failed to prove damages for the wrongful death. However, the Petitioners showed that this makes no sense and is not a viable explanation for the defense verdict. Specifically, as the Petitioners argued, the jury was charged as to the elements of damages recoverable for wrongful death. Likewise, the

jury was charged that the damages must be sustained by the statutory beneficiaries. (R. 767, 769). Many of those elements of damages are the same as may be claimed by the spouse during the decedent's lifetime as part of the consortium claim. (R. 771). The jury found a loss of consortium by Rita Pratt prior to her spouse's death, and as a result, it would not be logical to then conclude that the Respondent failed to prove a similar loss of society, support, and companionship after death. In sum, based on the record, it is illogical to conclude that the Respondent individually proved a loss of society, support, and companionship but then, as the Personal Representative, she failed to prove damages for the same elements as well as grief and sorrow. That interpretation of the verdict defies common sense and the evidence in the record. Instead, the only logical explanation for the jury's verdict is a defense verdict based on the issue of proximate cause. In effect, the jury found that the breach of the standard of care did not proximately cause the decedent's death.

The Court of Appeals, however, never addresses this analysis of the defense verdict on the wrongful death claim and its impact on the remaining claims. If the jury concluded – as it clearly did – that the Respondent did not prove that the Petitioners' alleged negligence caused the pneumonia, then that same conclusion must be applied to the other causes of action. Like the Respondent, the Court of Appeals focused only on the evidence that Pratt's pulmonary conditions worsened, but that is immaterial because the jury rejected that theory. Also like the Respondent, the Court of Appeals ignored the real issue – whether the rib injury would have been treated differently from March 2-4, 2015, if Pratt had been hospitalized on March 2nd. The Court of Appeals identifies that issue (Slip Op. at 8), but then never addresses it, just as the Respondent sidestepped it in her brief. Instead, the Court of Appeals proceeded to discuss the evidence showing a deterioration in Pratt's pulmonary condition – but again that is immaterial because the jury rejected

that argument. The focus must be on the rib injury and how that would have been treated differently during the alleged two-day delay in hospitalizing Pratt. Quite simply, the Court of Appealed never addressed that issue.

To reiterate, there may be evidence that Pratt's pulmonary condition worsened, but the jury rejected the theory that the Petitioners' alleged negligence proximately caused the deterioration in the pulmonary conditions. Logically speaking, if the jury had found proximate cause as to the pulmonary condition, it would have returned a verdict for the Respondent on the wrongful death claim. That did not occur. While there may have been evidence, as the Court of Appeals discussed, of the "causal connection between the delayed treatment of Pratt's acute rib injuries and his developing pneumonia" (Slip Op. at 10), the Court refused to discuss and credit the jury's determination that the Petitioners' alleged negligence *did not cause* Pratt's death, and there is no other logical explanation for that defense verdict on the wrongful death claim. Therefore, this Court is requested to grant a writ of certiorari and find that a JNOV should have been entered on the survival claim.

Likewise, the Court of Appeals did not address the Petitioners' argument for JNOV on the consortium claim. Because the trial court should have granted a JNOV on the survival claim, the loss of consortium claim fails as well. In *Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1999), the Court of Appeals explained that "[i]n order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's *liability* for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury." 512 S.E.2d at 523. (Emphasis added). Similarly, in *Lee v. Bunch*, 373 S.C. 654, 647 S.E. 2d 197 (2007), the Supreme Court held that "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and

independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202. Thus, because the Respondent failed to prove the Petitioners were liable on the injured spouse's claim, Rita Pratt's individual claim for loss of consortium fails on that same basis.

II. The Court of Appeals erred in affirming the denial of a new trial absolute where the jury's verdict was ambiguous and strongly indicative of juror confusion.

The Court of Appeals also failed to recognize that the Petitioners presented *alternative* arguments related to the impact of the wrongful death defense verdict on the survival and loss of consortium verdicts. Alternatively, the Petitioners argued that, in the event the Court concluded that the defense verdict on the wrongful death claim is not based on the absence of proximate cause, then the Court should grant a new trial absolute because the verdict is ambiguous and shows jury confusion. In its opinion, however, the Court of Appeals did not address this alternative position and treated the argument as an assertion of an "inconsistent verdict," which the Court of Appeals rejected because it was not raised prior to the discharge of the jury. But that is not what the Petitioners argued.

As this Court explained in *Vinson v. Jackson*, 327 S.C. 290, 491 S.E.2d 249 (1997), "[a] jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. However, when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." 491 S.E.2d at 250. *See also*, *Anderson v. Aetna Cas. & Sur. Co.*, 175 S.C. 254, 178 S.E. 819, 830 (1934) ("But when the verdict is so confused that it is not absolutely clear what was intended, the court should order a new trial").

Instead of addressing the Petitioners' alternative position as it was raised and articulated, the Court of Appeals simply ruled that a challenge to an "inconsistent" verdict must be raised

before the jury is discharged. To reiterate, the Petitioners are not arguing that the verdict is "inconsistent," but rather, the verdict may be deemed ambiguous in the event the Court construes the verdict differently than the Petitioners. Importantly, the Respondent has the same obligation as the Petitioners to make certain that a verdict is not inconsistent before the jury is discharged. The Respondent then is saddled with the same ambiguous verdict. Here, the Respondent did not ask for clarification of the verdict form before the jury was discharged to fully understand the impact of the jury's decision to leave the wrongful death blank on question number 3 of the Verdict Form. (R. 4). In addition, the Respondent, who has the burden of requesting a verdict form to demonstrate that she prevailed on the elements of her claims, did not ask for a verdict form that expressly asked whether the jury found that the Petitioners' negligence proximately caused the decedent's death. To the contrary, the only special interrogatory directed at the issue of proximate cause only permitted the jury to find that the breach of the standard of care "was the proximate cause of Mr. William Pratt's *injuries*." (R. 3). The jury was never asked and thus did not find that the breach of the standard of care was the proximate cause of Mr. Pratt's *death*. The deficiency in the verdict form is not the fault of the Petitioners because they have no obligation to ensure that the verdict form demonstrates each element of the Respondent's claims. That obligation is solely that of the Respondent.

In short, while any challenge to an inconsistent verdict has been waived by the discharge of the jury, that would be true for both sides. The Respondent must live with the defense verdict on the wrongful death claim, *including the inevitable and only reasonable conclusion that the jury found an absence of proximate cause for the decedent's death*. Yet, as an alternative and in the interest of due process and fundamental fairness, this Court, as articulated in *Vinson*, has the power to order a new trial absolute where the verdict "is so confused that the jury's intent is

unclear [and] the safest and best course is to order a new trial." *Vinson,* 491 S.E.2d at 250. The Court is respectfully requested to issue a writ of certiorari to reaffirm and apply the principles of fundamental fairness articulated in *Vinson* and, at the very least, to order a new trial absolute.

III. The Court of Appeals erred in affirming the denial of the Petitioners' directed verdict and JNOV motions on the issue of recklessness or conscious indifference.

In its opinion, the Court of Appeals affirmed the denial of the Petitioners' directed verdict and JNOV motions as to whether there was clear and convincing evidence that Dr. Gilleland acted with recklessness or conscious indifference. The Court's error is three-fold.

First, the Court of Appeals did not evaluate the evidence of recklessness by a "clear and convincing evidence" standard. The Verdict Form, to which the Respondent did not object, asked the following: "Do you find that the plaintiffs have proven by *clear and convincing evidence* that the defendants acted recklessly, willfully, or wantonly in their care and treatment for William Pratt?" (R. 5). (Emphasis added). Hence, that was the standard applied by the trial court, and that is – right or wrong – the law of the case. *See*, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case").[1]

Second, the Court of Appeals failed to recognize that the evidence established that the decision not to call the rib findings to the emergency room was based on Dr. Gilleland's clinical judgment that the findings were not clinically significant and thus did not need to be called to the attention of the Emergency Department. (R. 664). Radiology Department policy, as established by

[1] Moreover, this finding by the jury also demonstrates that the jury was never asked to make a finding on gross negligence, and as a result, the verdict cannot be read as finding that the Petitioners acted with gross negligence.

the Respondent's witness, Bruce Leonard, M.D., who was Chief of Radiology in 2015, provided that radiologists were allowed to make threshold decisions of clinical significance when deciding what findings needed to be noted or called in. Dr. Leonard explained that the rib fractures, if believed to be acute, should have been called in by Dr. Gilleland. But if there is no sign that the rib fractures are acute, Dr. Leonard testified that hospital policy did not require them to be called in. (R. 822). Dr. Gilleland did not interpret the rib fractures as acute, and there was supporting evidence for that conclusion given the absence of edema, swelling, and bruising to the soft tissue surrounding the ribs. (R. 661). Likewise, Anthony Lupetin, M.D., the Respondent's expert radiologist, agreed that chronic (i.e., not acute) rib deformities did not need to be reported. (R. 204). Dr. Lupetin also confirmed in his testimony that there were no cracks in any rib, no fracture lines in any rib, no breaks or separation in any cortical line of any rib, and no bone separation in any rib. (R. 204-207). Hence, it was, at worst, simple negligence that Dr. Gilleland interpreted the rib fractures as non-acute findings, particularly where the radiologist believes, as here, that the patient would not receive any different care or treatment. Certainly, there was not *clear and convincing evidence* of recklessness – even though the Court of Appeals did not even apply the clear and convincing standard, as required by the law of the case.

Third and perhaps most importantly, the trial court erred in permitting Dr. Lupetin to testify over objection that the Petitioners' conduct constitutes "recklessness," which is a legal conclusion drawn by applying law to the facts. (R. 202). The expert witness should not have been permitted to testify that the Petitioners' conduct rose to the level of recklessness as that was the ultimate decision for the jury. The expert witness may testify as to the standard of care and whether a defendant’s conduct breached that standard of care, but whether such conduct constitutes recklessness, based on the legal standard, is not appropriate testimony from an expert witness.

Citing its decision in *Hamilton v. Regional Medical Center*, 440 S.C. 605, 891 S.E.2d 682 (Ct. App. 2024), the Court of Appeals correctly ruled that the question posed to Dr. Lupetin "seeks an inadmissible legal conclusion." (Slip Op. at 15). Nonetheless, the Court of Appeals found "no reversible error here" on the premise that the "Petitioners have failed to establish the required resulting prejudice." (Slip Op. at 15).

However, the requisite prejudice is clearly demonstrated by the jury's conclusion as stated in the Verdict Form that "the Plaintiffs have proven by clear and convincing evidence that the Defendants acted recklessly, willfully or wantonly in their care and treatment of William Pratt." (R. 5). The finding of recklessness, willfulness, or wantonness greatly prejudices the Petitioners because, if allowed to stand, they lose the benefit of the non-economic damages cap. *See*, S.C. Code Ann. § 15-32-220(E) ("The limitations for noneconomic damages rendered against any health care provider or health care institution do not apply if the jury or court determines that the defendant was grossly negligent, willful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damage*s*"). Contrary to the Court of Appeals' suggestion, the defense verdict on punitive damages did not undo that prejudice; it simply did not exacerbate the prejudice. In sum, the Court of Appeals overlooked the fact that the issue of recklessness was for the jury to make based solely on the law as charged by the trial court. It was not the proper subject of an expert opinion, and as the jury's verdict reflects, prejudicial error resulted. In fact, Dr. Lupetin's opinion on "recklessness" was the very last question posed by the Respondent's counsel and thus received extra emphasis and attention. (R. 202). In effect, the expert witness was allowed to usurp the jury's role, and that opinion obviously carried great weight with the jury which found that the Petitioners were reckless, willful, or wanton.

In sum, these present critical issues for this Court to consider and provide much needed edification for the bench and bar particularly on the recurring issue where experts are requested to opine on what are legal conclusions, such as whether certain conduct constitutes negligence or rises to the level of "gross negligence" or "recklessness." This Court should also address the prejudice aspect of such expert testimony and under what circumstances an expert's legal conclusion is prejudicial as opposed to mere harmless error. This issue alone clearly warrants the issuance of a writ of certiorari.

IV. The Court of Appeals erred in affirming the denial of the motion for new trial absolute where the verdict of $640,000 on the loss of consortium claim is unsupported by the evidence and is grossly excessive.

The Respondent presented no evidence that the failure to admit the decedent to the hospital on March 2, 2015, proximately caused any loss of consortium to Rita Pratt individually. Based upon the Respondent's theory of liability, the Petitioners' actions led to an approximate two-day delay in the decedent being hospitalized. During those two days, Mr. Pratt was at home. The evidence from the family indicated that he laid down for those two days; he would not get up to use the bathroom or eat or drink. If the alleged negligence had not occurred, the Respondent contends that Mr. Pratt would have been hospitalized on March 2, 2015. He was thereafter hospitalized from March 4, 2015, through March 23, 2015, when he died. The Respondent, however, has not pointed to any evidence of loss of consortium that was proximately caused by the approximate two-day delay in hospitalizing Mr. Pratt. Importantly, the Respondent would have lost the same consortium had Mr. Pratt been hospitalized two days earlier.

Certainly, there is no evidence in the record to support an award of $640,000 for loss of consortium. Accordingly, that verdict was grossly excessive. As this Court has explained,

"[w]hen a party moved for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557, 558 (1993). "[W]hen the verdict is so grossly excessive … that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge … to set aside the verdict absolutely." *Id*., *citing* Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753, 758 (1985).

Yet, as to the excessiveness of the loss of consortium verdict of $640,000, the Court of Appeals misperceived the Petitioners' position. The Petitioners did not argue that the loss of consortium was necessarily limited to two days. Instead, as the Petitioners explained, based upon the Respondent's theory of liability, the Petitioners' actions led to an approximate two-day delay in the decedent being hospitalized. Yet, to reiterate, the Respondent would have lost the same consortium had Mr. Pratt been hospitalized two days earlier. The Court of Appeals, however, did not address this argument.

Moreover, at most, the loss of consortium award of $640,000 covers a total of 21 days, from March 2, 2015 through the date of death on March 23, 2015. Importantly, the jury found for the Petitioners on the wrongful death claim, which would be inclusive of consortium-type damages, i.e., the loss of services, society, and companionship, which accrued after the spouse's death. Therefore, at most, the loss of consortium covers a total of 21 days, meaning the Respondent has received an award in excess of $30,000 per day.

Notably, the Court of Appeals, like the Respondent, cited no case law to support a $30,000 per day consortium award. The Court cited only to *Keene v. CAN Holdings, LLC*, 426 S.C. 357,

827 S.E.2d 183 (Ct. App. 2019), but that case does not explain whether the consortium claim was for pre-death loss or after-death loss. In effect, the opinion provides no explanation to support that award, other than to point out that the wife had "47 years of marriage to her best friend." 827 S.E.2d at 198. The only other case cited by the Court of Appeals was a survival action verdict for a juvenile which is absolutely not persuasive or supportive of the verdict.

Further, in evaluating whether the $640,000 award is grossly excessive, the Court of Appeals did not consider the fact that that consortium award is almost twice the amount awarded to the decedent for his pain and suffering over the same period of time. The decedent received $360,000 for 21 days of pain, suffering, and other non-economic harm. That alone shows that the loss of consortium award is exorbitantly high and must be based on considerations beyond the evidence. Moreover, while the Respondent argues that the decedent could not provide "aid, comfort, and support" while he lay on the couch at home for two days, there is no evidence that he would have provided any greater degree of such care to his wife had he been hospitalized beginning on March 2, 2015. The loss of "aid, comfort, and support" while hospitalized was not proximately caused by the Petitioners' conduct. Rather, it was caused by the fact that the decedent had been injured in a fall down a set of stairs, was already in declining health for unrelated reasons, and was required to be hospitalized.

In sum, the loss of consortium award of $640,000 – whether for two days at home or for 21 days in the hospital -- was grossly excessive. There is no other credible argument, legally or factually, that can be made to support such a grossly excessive award. Accordingly, this issue warrants the issuance of a writ of certiorari.

V. The Court of Appeals erred in affirming the jury's allocation of fault between the Petitioners and in upholding an allocation of ten percent fault to the practice which may only be held vicariously at fault.

The Petitioners contend that the trial court committed reversible error in requiring the jury to allocate fault between Rock Hill Radiology Associates and Dr. Geoffrey Gilleland and, more importantly, in upholding an allocation of ten percent fault to the practice which may only be held vicariously at fault based on this record. The Court of Appeals rejected that argument because the Petitioners did not object to the verdict form. However, the verdict form notwithstanding, the Petitioners may certainly argue in post-trial motions and on appeal for a new trial absolute because the ten percent allocation of fault to Rock Hill Radiology Associates is unsupported by the evidence or the law of the case.

In fact, the Court of Appeals overlooked that the controlling law of the case is fully dispositive of this issue. The Respondent did not plead a direct liability claim against Rock Hill Radiology Associates. There are no allegations in the Complaint of any negligence by Virtual Radiology or that Virtual Radiology was the agent of Rock Hill Radiology Associates or that the practice is liable for Virtual Radiology under a non-delegable duty theory. (R. 25-30). Instead, to justify the verdict after the fact, the Respondent relied entirely on a non-delegable duty theory as recognized in *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000). The Respondent claimed that Rock Hill Radiology Associates is liable for the acts and omissions of a different radiology provider, Virtual Radiology, based a non-delegable duty and a principle-agent relationship. The Respondent pointed to excerpts from the transcript where her counsel continuously tried to argue that the practice was liable for the acts and omissions of Virtual Radiology. The trial court, however, never ruled that the Respondent could pursue an agency or non-delegable duty claim. *In fact, the trial court ruled there was no such claim*. (R. 139). And

each time the issue arose -- even as an objection to the jury instructions -- the trial judge consistently disallowed that theory of liability to be pursued. (R. 780). The trial court even sustained objections on the issue during closing argument. (R. 752). There should be no question that the Respondent's attempt to assert a direct liability claim presented an ongoing struggle throughout the trial as the Respondent's counsel repeatedly disregarded the trial court's rulings, and there was also colloquy that demonstrated confusion on the issue.

But what is not confusing in the record and what the Court of Appeals disregarded is the jury charge itself. That demonstrates *beyond dispute* that the trial judge did not allow a direct liability claim against Rock Hill Radiology Associates to go to the jury. There are no instructions to the jury on a non-delegable duty theory. There are likewise no instructions on principle-agency law. The jury was not given any guidance as to any direct liability claim against the practice. The reason for that is obvious -- there was no such claim pled or tried or charged to the jury for its adjudication. In short, an unpled claim that the trial court did not allow to proceed and on which no instructions were given cannot be used *after the fact* to justify the verdict returned against Rock Hill Radiology Associates. The trial court thus erred in refusing to reverse the direct liability verdict and allocation of fault to Rock Hill Radiology Associates and to grant a new trial absolute.

VI. The Court of Appeals erred in failing to order that the verdict be reduced based on the non-economic damages cap of $431,865.00.

The Petitioners also argued that the trial court erred in failing to reduce the verdict based on the non-economic damages cap as set forth in S.C. Code Ann. § 15-32-220. The trial court presumably refused to apply the non-economic damages cap based on the jury's finding that the

Petitioners "were reckless or grossly negligent in their care and treatment of William Pratt." (R. 5).[2] Because the Petitioners were entitled to a JNOV on the issue of recklessness, they are also entitled to a cap of $431,865 on the non-economic damages. For the reasons discussed above, the evidence does not support a finding of recklessness by clear and convincing evidence.

Nonetheless, even if the jury's finding of recklessness is upheld on appeal, the Petitioners argued that does not alone preclude the application of the non-economic damages cap in this case. The Court of Appeals, however, failed to even address that issue. S.C. Code Ann. § 15-32-220(E) provides: "The limitations for noneconomic damages rendered against any health care provider or health care institution do not apply if the jury or court determines that the defendant was grossly negligent, willful, wanton, or reckless, *and such conduct was the proximate cause of the claimant's noneconomic damages*." S.C. Code Ann. § 15-32-220(E). (Emphasis added).

The application of the non-economic damages cap is self-executing. In *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005), the Court of Appeals examined the application of a similar type of monetary statutory cap under the Tort Claims Act. Using mandatory language, the Court wrote: "We conclude that the monetary statutory cap is self-executing and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000." 607 S.E.2d at 716. Thus, the burden falls on a plaintiff to prove the exception contained in S.C. Code Ann. § 15-32-220(E). *See*, *Chastain v. AnMed Health Foundation,* 388 S.C. 170, 694 S.E.2d 541 (2010) (this Court ruled that a plaintiff bears the burden of proving facts to justify a judgment in excess of the $300,000 monetary cap).

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[2] To reiterate, the Court of Appeals is mistaken in suggesting that the jury found "gross negligence." The Verdict Form asked the following: "Do you find that the plaintiffs have proven by *clear and convincing evidence* that the defendants acted recklessly, willfully, or wantonly in their care and treatment for William Pratt?" (R. 5). Thus, there was never any finding of "gross negligence."

As the highlighted language demonstrates, the exception to the cap found in S.C. Code Ann. § 15-32-220(E) requires a finding that "such conduct was the proximate cause of the claimant's noneconomic damages." However, the Respondent did not sustain her burden on this element of the statutorily-mandated analysis. The jury's findings as contained in Questions 4 and 5 of the Verdict Form do not address causation of the non-economic damages. In fact, none of the special interrogatories address proximate cause with respect to any of the loss of consortium damages -- all of which are non-economic damages. The Respondent bears the burden of proving the exception contained in S.C. Code Ann. § 15-32-220(E), a burden she clearly did not satisfy given the verdict form returned by the jury.

Because the non-economic damages cap applies to this case, the Court is asked to grant a writ of certiorari to determine what is the cap applicable to this case as well as whether one cap should apply consistent with the arguments that the Petitioners previously asserted and which the Court of Appeals did not reach.[3] This Court is asked to apply the cap on non-economic damages in the amount of $431,865.00 which represents the cap in effect in March 2015, when the Respondent's cause of action accrued.

[3] The Petitioners provided a detailed analysis in the Court of Appeals demonstrating that Dr. Gilleland and Rock Hill Radiology should be treated as a "single health care provider" and, accordingly, are liable for a single cap of non-economic damages. The Petitioners also provided a detailed analysis to show that the cap on non-economic damages, as established by S.C. Code Ann. § 15-32-220(F), is $431,865.00 which represents the cap in effect in March 2015, when the Respondent's cause of action accrued. The Respondent, on the other hand, contends that the cap on non-economic damages is $472,625.00 which represents the cap published in the February 28, 2020 State Register, and was thus established *after* the verdict was returned. The Petitioner incorporates by reference that analysis as contained on pages 23 through 31 of their Opening Brief filed in the Court of Appeals. The Court of Appeals never reached those issues but should have.

VII. The Court of Appeals erred in failing to grant a set-off for the Amisub settlement based on the allocations announced to the trial court when the settlement was placed on the record but rather allowed the Respondent to alter those allocations after knowing the jury's verdict.

On February 10, 2020, a judgment was entered in the amount of $1 million in favor of the Respondent against the Petitioners. By Form Order filed May 4, 2020, the trial court granted "a set off of Plaintiff's claims in the amount of $83,333.33 each for the survival claim and the loss of consortium claim from the time the judgment was rendered on February 10th, 2020." (R. 12-14). Therefore, the total judgment amount entered by the trial court is $833,333.34.

During the course of the trial, the Defendant Amisub reached a settlement with the Respondent for a total of $250,000. (R. 7-11, 565). There is no dispute that the claims that the Respondent brought against Amisub are the same as the claims brought against the Petitioners. Likewise, there is no dispute that the injuries claimed against Amisub are the same as the injuries claimed against the Petitioners. Thus, the parties agree that the Petitioners are entitled per statute and in equity to a set-off of the settlement amount paid by Amisub. *See*, S.C. Code Ann. § 15-38-50(1); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967); *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975).

As the Court of Appeals acknowledged, the Respondent conceded that "[w]hen the settlement was announced to the Court during trial, the parties suggested the settlement funds might be allocated with 90% apportioned to the loss of consortium claim and 5% allocated respectively to the survival and wrongful death claims." (R. 97). However, on February 20, 2020, which was ten days after the trial ended and the judgment was entered, the Respondent petitioned the trial court to approve the settlement with Amisub using a different allocation of the $250,000 settlement amount among the three claims than the allocation that was conveyed to the

court and the parties during the trial. The Respondent claimed an allocation of one-third to each claim. That would reduce the set-off for the loss of consortium action from $225,000 to $83,333.33 and increase the set-off for the survival action from $12,500 to $83,333.33. That would also increase the set-off for the wrongful death action from $12,500 to $83,333.33; yet, that change was made after the Respondent learned the jury returned a defense verdict on the wrongful death claim. During the hearing, the trial court acknowledged that "at the time the settlement was agreed upon during the course of the trial that was made a part of the record." (R. 907). The trial court then applied the set-offs as requested by the Respondent. (R. 907).

The Court of Appeals found no error because a "settlement allocation hearing" may not take place until after the jury verdict. The Court, however, conflated the "settlement allocation hearing," which correctly must occur after the trial, with a settlement approval hearing where a court approves a death settlement. This Court in *Jolly v. Fisher Controls International, LLC.*, 443 S.C. 511, 905 S.E.2d 380 (2024), did not hold that a settlement approval hearing must await the completion of trial. In effect, the *Jolly* case does not require a court to await trial to approve the settling parties' own allocation of the settlement amount between wrongful death, survival, and loss of consortium claims. If that were the law, a settlement reached between a plaintiff and one of multiple defendants early in the litigation could not be approved for months or even years until all parties settled or the case gets tried. That is clearly not what this Court intended with its ruling in *Jolly*.

In sum, in this case, the set-offs should have been applied based on the settling parties' original agreement as addressed *at the time the settlement was announced to the trial cour*t, and the parties should be bound by that agreement. The Court is respectfully requested to grant a writ of certiorari to clarify the confusion wrought by the Court of Appeals' misreading of *Jolly*.

CONCLUSION

Based on the foregoing discussion, the Petitioners Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, M.D. respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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