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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2020-000838
Case No. 2016-CP-46-3181

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, D.O.; Rock Hill Radiology Associates, LLC; and Geoffrey T. Gilleland, M.D., ... Defendants,

Of Which, Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, M.D. are ..... Appellants.

BRIEF OF APPELLANTS

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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 Appellants 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 Appellants 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 Appellants 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 Appellants 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 Appellants thereafter filed post trial motions including for judgment notwithstanding the verdict (JNOV), or alternatively, a new trial absolute. In the alternative, the Appellants 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 Appellants 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 Appellants thereafter filed a timely appeal to 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 Appellant 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 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).

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.*

"In an action at law, on appeal of a case tried by a jury, [appellate courts] may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 142 (2010).

"Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." *Austin*, 691 S.E.2d at 149. "Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge should not be required to guess as to what a jury sought to render." *Id.*

ARGUMENTS

I. The trial court erred in denying the Appellant's 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.

The Respondent alleges that the Appellants 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. There is, however, no evidence that the failure to admit the decedent to the hospital on March 2, 2015, proximately caused any injuries to the decedent. Most important to this analysis, 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). However, with its defense verdict, the jury actually found that the Appellants' breach of the standard of care did not result in the decedent's death. Thus, it logically follows that the Appellants' alleged negligence did not cause the pneumonia that resulted in his death.

As the verdict form reflects, the jury found 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 jury was correctly charged that the Respondent had the burden of proving that the Appellants' negligence proximately caused the death. (R. 768). Further, the jury was correctly charged that the damages in a wrongful death action are sustained by the statutory beneficiaries. (R. 768-769). 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). That verdict cannot be logically construed as the jury's determination that the Respondent failed to prove damages for the wrongful death.

The jury was charged as to the elements of damages recoverable for wrongful death. 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. Further, loss of consortium explicitly does not include damages for grief and sorrow, which are significant elements of damages recoverable for wrongful death.

Based on this 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 case of *Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010), is instructive on the issue of proximate cause. In that case, the plaintiffs argued that a radiologist breached the standard of care by failing to properly report that a catheter inserted in an infant was "malpositioned" or use some language in his report to indicate that the placement of the catheter was incorrect. There was no evidence that the radiologist misread the chest x-ray. The

plaintiffs' theory was simply that the radiologist should have done a better job of communicating his findings. However, the undisputed evidence showed that the neonatologist fully understood that the placement of the catheter was not optimal, but he made a clinical decision not to move it. In affirming summary judgment for the radiologist, the Supreme Court explained:

> Dr. Smith correctly contends the record fails to establish that a genuine question of material fact exists regarding whether his alleged failure to act within the standard of care could have been a proximate cause of Jamia's cardiac arrest and subsequent injuries. This is so because the record demonstrates that Dr. Goldstein was aware of the standard of care concerning UVC placement and he made an intentional and independent decision not to move the UVC based on numerous factors.

694 S.E.2d at 5. The Supreme Court thus concluded that the plaintiffs had failed to present any evidence that the radiologist's alleged breach of the standard of care in his reporting was a proximate cause of the infant's injuries. In effect, there was no evidence presented that the care or treatment received by the patient would have been different.

The same is true in the present case where the evidence does not permit a finding that the Appellants caused the non-displaced rib fractures. That injury resulted from the decedent's fall on March 2, 2015. The Appellants obviously did not cause the fall. Moreover, there was no allegation made nor evidence presented that the Appellants missed the L1 vertebrae fracture that did not show on the CT scan from March 2, 2015. Then, what injury did the Appellants cause? At worst, the Appellants caused a two day delay in the diagnosis of the rib injury, but there is no evidence that the rib injury would have been treated any differently in those two days. (R. 640-641). Specifically, to the extent that the rib injury was causing pain, the decedent was prescribed pain medication prior to his discharge from Piedmont Medical Center. Thus, there was no other treatment for the rib injury that would have begun two days earlier, and there is no evidence that the decedent's pain or other possible symptoms related directly to the rib injury would have been alleviated or lessened.

Consequently, the Respondent failed to sustain her burden of proving that the alleged negligence by the Appellants proximately caused any injury to the decedent, and as a result, the Appellants were entitled to a JNOV on the survival claim. The trial court erred in denying that JNOV.

Moreover, 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 Appellants were liable on the injured spouse's claim, Rita Pratt's individual claim for loss of consortium fails on that same basis.

II. The trial court erred in not granting a new trial absolute where the jury's verdict was ambiguous and strongly indicative of juror confusion.

Alternatively, if the Court concludes that the defense verdict on the wrongful death claim was not based on the issue of proximate cause, the Respondents submit that the South Carolina Supreme Court has held that "[v]erdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge should not be required to guess as to what a jury sought to render." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 149 (2010). The Supreme Court has explained: "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." *Vinson v. Jackson*, 327 S.C. 290, 491 S.E.2d 249, 250 (1997). *See also, Anderson v. Aetna Cas. & Sur. Co.*, 175 S.C. 254, 178 S.E. 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").

The Respondent argued in response to post-trial motions that any challenges to the verdict have been waived because the jury has been discharged. The trial court is not permitted, however, to accept an ambiguous or confusing verdict simply because the jury was discharged. The Supreme Court's decision in *Vinson, supra*, makes that very point. In that case, the jury was discharged without an objection by either side, after which a new trial motion was made and denied by the trial judge. On appeal, the Supreme Court explained that "[o]nce the jury in a civil case is discharged, the trial judge has little power to correct or amend a jury's verdict which, on its face, is *unambiguous*." *Vinson*, 491 S.E.2d at 250. (Emphasis added). However, where the verdict is ambiguous, the Supreme Court is quite clear that the verdict may not be allowed to stand. In *Vinson*, the Supreme Court found that "[t]he verdict is internally inconsistent and unexplainable" and "accordingly, the appropriate remedy on appeal is to grant a new trial." *Id.*

The Supreme Court has also addressed a similar issue raised by the verdict in this case. In *Stevens v. Allen*, 342 S.C. 47, 536 S.E.2d 663 (2000), the Supreme Court held that "[a] verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law." 536 S.E.2d at 666. In that case, the jury found the defendant liable in a wrongful death action but awarded zero damages. Like the Respondent in the present case, the defendant in *Stevens* urged the Supreme Court to "find the jury's verdict reflective of its determination that the plaintiffs failed to prove any damages." 536 S.E.2d at

665. The Supreme Court "decline[d] to adopt this view. Such a holding is inconsistent both with the jury's assessment of liability and with South Carolina case law." *Id*. The Supreme Court further explained:

> It is simply inconsistent with South Carolina law for this Court to attempt to construe the verdict as an indication that the jury found the plaintiffs failed to prove damages. If, in fact, the jury believed the Stevens had failed to prove any damages, then its verdict should have been for the defendants.

Id.[1]

In the present case, the Respondent attempted to justify the jury's verdict on the wrongful death claim by asserting -- based on pure supposition -- that the jury found for the Respondent on proximate cause but nonetheless found that the Respondent failed to prove wrongful death damages. That is precisely the rationale that was rejected by the Supreme Court in *Stevens*, and as explained above is exceedingly illogical. In fact, this case presents an even stronger repudiation of that argument because, while *Stevens* involved a zero damages award, in the present case, the jury left the damages space blank and made no finding of liability for wrongful death.

In sum, because of the special interrogatories actually posed in the verdict form, the only logical interpretation is a defense verdict on the wrongful death claim. However, there does appear to be a lack of clarity leaving the trial court (and this Court on appeal) to guess as to the

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[1] The Respondent cited the case of *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003), suggesting that that case allowed for a zero verdict on a loss of consortium claim to stand as consistent. That is not accurate. In *Daves*, the jury initially returned a verdict in favor of Mrs. Daves on the loss of consortium claim, but awarded damages of zero dollars. As the opinion explains, "[t]he circuit court declined to accept the verdict on the loss of consortium claim, informing the jury that it was an unacceptable verdict. The judge requested the jury clarify whether they intended a verdict for Cleary by giving a zero damages amount or to award some monetary amount to Jane Daves if they intended a verdict in her favor. After further deliberations, the jury returned a verdict in favor of Cleary." 584 S.E.2d at 430.

jury's intentions. Moreover, the verdict as a whole, including the unsupported monetary awards on the survival and loss of consortium claims, demonstrates juror confusion. Thus, given the guidance from the Supreme Court in such cases as *Vinson*, a new trial absolute should have, at the very least, been granted.

III. The trial court erred in requiring the jury to allocate fault between the Appellants and in upholding an allocation of ten percent fault to the practice which may only be held vicariously at fault.

The trial court committed reversible error in requiring the jury to allocate fault between Rock Hill Radiology Associates and Dr. Geoffrey Gilleland. The two Appellants should have been treated as one based on the evidence presented and the allegations in the Respondent's Complaint. The practice's liability was based solely on respondeat superior. 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). Consequently, there was no basis for the jury to have concluded that the practice was ten percent at fault or for that allocation of fault by the practice to stand.

S.C. Code Ann. § 15-38-15(C)(3)(a) states as follows: "For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant." S.C. Code Ann. § 15-38-15(C)(3)(a). Therefore, where a plaintiff sues an individual and his employer, and the employer's liability is vicarious and contingent solely on the acts or omissions of that employee, S.C. Code Ann. § 15-38-15(C)(3)(a), using the mandatory term

"must," mandates that the employee and employer be treated as a "single party" to determine the fault of those defendants.

The Respondent's response in the trial court on these issues actually demonstrates the merit of the Appellants' position. In a flawed attempt at justification for that verdict, the Respondent goes beyond the pleadings. Specifically, the Respondent argues that "Rock Hill Radiology bears legal responsibility for Virtual Radiology's negligence because these two entities maintained an agency relationship in March 2015." (R. 85).

In effect, the Respondent attempts to justify the verdict against Rock Hill Radiology based 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), which is typically alleged against a hospital and not a medical practice. A non-delegable duty based on *Tuomey* was never pled in the Respondent's Complaint and was not tried in this case. In fact, the Respondent made a pre-trial motion to pursue a *Tuomey* claim which the trial court denied. (R. 139). Certainly, the jury's verdict cannot be justified based on a claim that the trial court did not permit and one that clearly was not pled, subjected to discovery, or tried to the jury. A review of the jury charge demonstrates that the trial court never allowed a non-delegable duty theory of liability to be decided by the jury. There is no jury charge on the elements to be proven for a *Tuomey* claim. There is no jury charge on the law governing non-delegable duties. There is no jury charge on the law of agency or when an entity may be held liable for the acts or omissions committed by an independent contractor. Obviously, a verdict cannot be legally justified after the fact on the basis of an unpled claim or unpled theory *on which the jury never received any instruction from the trial court*. As the Supreme Court has held, "[a] judgment must be in accord with the pleadings of the party in whose favor it is rendered, or it is fatally defective." *Blackburn & Co., Inc. v. Dudley*, 289 S.C. 415, 338 S.E.2d 151, 153 (1985). The

Supreme Court explained that "a plaintiff who pled one theory should not be allowed to recover upon another." 338 S.E.2d at 152. The same is true for an unpled theory.

As further evidence that the trial court did not permit the Respondent to pursue an unpled claim or theory of non-delegable liability based on any acts or omissions allegedly committed by Virtual Radiology, the record shows that, after the jury charge was given, the Respondent renewed her request that the trial court make a finding and charge the jury "that Virtual Radiology is an agent of Rock Hill Radiology." That request was denied, with the judge stating that "I stand by my prior ruling." (R. 780). Likewise, during closing arguments, the Respondent's counsel tried twice in quick succession to argue to the jury that Rock Hill Radiology is liable for acts or omissions allegedly committed by Virtual Radiology, and objections by the Appellants' counsel were both sustained after a sidebar, with the trial court not allowing the argument to be made. (R. 752). Those rulings are the law of this case.

The Respondent's continued attempt to justify the jury's allocation of ten percent fault to Rock Hill Radiology based on an unpled claim or theory makes the Appellants' point. There, quite simply, is no evidence of any negligence or wrongdoing by anyone employed by Rock Hill Radiology other than Dr. Gilleland. To try to explain the ten percent allocation of fault, the Respondent had to rely on an unpled claim and theory of non-delegable liability that the trial court rejected during the trial itself. That unpled claim or theory of non-delegable liability, however, cannot be used to justify the verdict after the fact, as the Supreme Court made clear in *Blackburn*.

In sum, the failure to treat Dr. Gilleland and his practice, Rock Hill Radiology, as a single party on the verdict form is an additional error that demonstrates that a new trial absolute is warranted. Likewise, there is no legal basis for holding Rock Hill Radiology to be ten percent at fault on a non-vicarious liability basis, which further demonstrates the need for a new trial absolute.

IV. The trial court erred in denying the motion for new trial absolute where the verdict of $640,000 on the loss of consortium claim 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 Appellants' 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 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 the Supreme 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).

In the trial court, the only way that the Respondent attempted to justify the verdict is to commingle or conflate a loss of consortium claim and a wrongful death claim. Given its Form Order denial without any substantive analysis, the trial court presumably agreed with the Respondent, which constitutes reversible error. In effect, the Respondent attempted to justify the verdict by pointing to evidence about the loss that resulted from Mr. Pratt's death. (R. 89). That would be the loss of consortium that is recoverable *after death* by a spouse through a wrongful death claim, and of course, the Respondent received a defense verdict on the wrongful death claim. (R. 4). The jury thus found that the Appellants did not cause the decedent's death, and as a result, the Appellants cannot be held liable for damages resulting after the spouse's death, including any loss of consortium that occurred after his death.

Indeed, it is well settled that loss of consortium damages extend only from the date of injury *through the injured spouse's death*. *See, Restatement (2d) of Torts*, § 693, comment f (1977) ("In case of death resulting to the impaired spouse, the deprived spouse may recover under the rule stated in this Section only for harm to his or her interests and expense incurred between the injury and death. For any loss sustained as a result of the death of the impaired spouse, the other spouse must recover, if at all, under a wrongful death statute"). *See also, Amato v. Bell & Gossett*, 116 A.3d 607, 626 (Pa. 2015) ("[l]oss-of-consortium damages are limited to the time between the spouse's injury and his death"); *Hatch v. Tacoma Police Dept.*, 107 Wash. App. 586, 27 P.3d 1223, 1225 (2001) (in action brought after injured spouse's death, plaintiff's common-law loss-of-consortium claim limited to damages prior to spouse's death); *Bridges v. Van Enterprises*, 992 S.W.2d 322, 325 (Mo. App. 1999) ("[w]hen a spouse dies as a result of

negligence of a third party, a loss of consortium claim allows recovery of damages for services calculated to the time of the injured spouse's death"); *Durham ex rel. Estate of Wade v. U-Haul International*, 745 N.E.2d 755, 765 (Ind. 2001) (recognizing "[m]ost states continue to adhere to the rule that common law recovery for loss of consortium damages is limited to the period between the spouse's injury and the spouse's death"); *T&M Investments v. Jackson*, 206 Ga. App. 218, 425 S.E.2d 300 (1992) (same); *Archie v. Hampton*, 112 N.H. 13, 287 A.2d 622 (1972) (same).

South Carolina law is in accord. It is well settled that "[a]t common law, a spouse is entitled to recover the value of the injured spouse's services, society, and companionship in an action for loss of consortium." *Gosnell v. Dorchester County School District No. 2*, 301 S.C. 21, 389 S.E.2d 865, 866 (1990). *See also, Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995). South Carolina statutory law similarly references the "injured spouse" rather than "deceased spouse." *See*, S.C. Code Ann. § 15-75-20.

In the present case, the jury found no liability for the decedent's death, and that must include any damages sustained by Rita Pratt after her spouse's death or resulting from his death. Quite obviously, Mrs. Pratt was a statutory beneficiary, and wrongful death damages include the same types of damages recoverable during the spouse's lifetime for loss of consortium, including loss of companionship, aid, comfort, society, and services, but after death occurs. (R. 769). This Court has, in fact, recognized that "the factors to consider for damages in a wrongful death action include loss of consortium." *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215, 227 (Ct. App. 2002).

Therefore, Mrs. Pratt's recoverable consortium is limited to the period of time preceding her spouse's death. Again, there is no evidence of a loss of consortium proximately caused by the

approximate two-day delay in hospitalization from March 2, 2015 (the date of the alleged negligence) and March 23, 2015 (the date of death). Additionally, even if the two days that the decedent was at home resulted in some loss of consortium, the award of $640,000 for two days where the decedent laid on the couch at home (rather than in a hospital room) is still grossly excessive. There is no other credible argument, legally or factually, that can be made to support such a grossly excessive award for, at most, two days of lost consortium. The trial court erred in allowing that verdict to stand.

V. The trial court erred in denying the Appellants' directed verdict and JNOV motions on the issue of gross negligence, recklessness, willfulness, and wantonness.

There was not clear and convincing evidence presented that the Appellants acted grossly negligent, recklessly, willfully, or wantonly in the care of the decedent. The trial court erred in denying the directed verdict and JNOV motions on the issue of gross negligence, recklessness, willfulness, and wantonness.

The evidence does not support a finding by clear and convincing evidence of a conscious disregard by Dr. Gilleland. The evidence established that the decision to not 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 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

indicated 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.

This issue highlights an evidentiary error made by the trial court.[2] The court permitted Dr. Lupetin to testify over objection that the Appellants' 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 Appellants' 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

[2] The Appellants' counsel experienced great difficulty in obtaining the trial transcript, and there are numerous places where that transcript can be challenged as not being accurate or complete. One primary such place involves the inquiry by the Respondent's counsel to Dr. Lupetin as to whether the conduct of Dr. Gilleland was "reckless." (R. 202). The transcript does not show that a contemporaneous objection to that question was made by the Appellants' counsel or ruled upon by the trial court. The transcript gives no indication of even a side bar occurring. However, the issue arose again a short time later when the jury was out of the courtroom. The Appellants' counsel raised the objection as to the expert offering an opinion on recklessness. There is mention of a sidebar, and the trial court stated that the "objection's in" and further stated, "I noted the objection at the time it was made, but I still stand by my ruling, and I overruled your objection." (R. 217). The transcript does not reflect the sidebar or the court's ruling based on that sidebar, which is likely the result of errors in the transcription, but the later comments from the court should be sufficient to demonstrate that a contemporaneous objection was made and this issue is properly preserved for appellate review.

constitutes gross negligence or recklessness, based on the legal standard, is not appropriate testimony from an expert witness. *See, Radford v. Chevron USA, Inc.*, 991 F.2d 806 (10th Cir. 1993) ("[a]n expert may not state legal conclusions drawn by applying law to the facts"). This was a prejudicial error as demonstrated by the jury's finding of gross negligence or recklessness where the evidence otherwise did not support such findings. In short, 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. 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 Appellants were grossly negligent or reckless. This presents an additional basis for why a new trial absolute is warranted.

VI. The trial court erred in failing to reduce the verdict based on the non-economic damages cap of $431,865.00.

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 Appellants "were reckless or grossly negligent in their care and treatment of William Pratt." (R. 5). Because the Appellants were entitled to a JNOV on the issue of recklessness or gross negligence, 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 or gross negligence by clear and convincing evidence.

Nonetheless, even if this Court upholds the jury's finding of recklessness or gross negligence by the Appellants, that does not preclude the application of the non-economic damages cap in this case. 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), this Court examined the application of a similar type of monetary statutory cap under the Tort Claims Act. Using mandatory language, this 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) (Supreme Court ruled that a plaintiff bears the burden of proving facts to justify a judgment in excess of the $300,000 monetary cap).

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 must next determine what is the cap applicable to this case as well as whether one cap should apply. Those issues are addressed in turn.

A. The Appellants should be treated as a "single health care provider."

By way of background, S.C. Code Ann. § 15-32-220 and its cap on non-economic damages was enacted by the South Carolina General Assembly as part of the South Carolina Noneconomic Damages Awards Act of 2005, S.C. Code Ann. § 15-32-200, *et seq*. That statute was enacted as part of 2005 Act No. 32, which was likewise a component of the significant tort reform legislation passed in 2005 that also included 2005 Act No. 27. Act No. 27 was signed by the Governor on March 21, 2005, and Act No. 32 was signed two weeks later on April 4, 2005. Both Acts included wide-ranging tort reform measures, all of which were effective July 1, 2005. Act No. 32, in fact, included an amendment to S.C. Code Ann. § 15-38-15, which had just been enacted two weeks earlier.

It is well settled that "[s]tatutes that are part of the same act must be read together." *White v. State*, 375 S.C. 1, 649 S.E.2d 172, 175 (Ct. App. 2007). In addition, "[s]tatutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable." *Id*. *See also*, *Protection & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 789 S.E.2d 756, 760 (Ct. App. 2016) ("statutes are to be construed with reference to the whole system of law of which they form a part"); *Great Games, Inc. v. South Carolina Department of Revenue*, 339 S.C. 79, 529 S.E.2d 6, 8 (2000) ("statutes which are part of the same legislative scheme should be read together"). Clearly Act

No. 27 and Act No. 32 should be read and construed together; they are clearly part of the same legislative scheme and were enacted in concert as part of tort reform in 2005.

S.C. Code Ann. §§ 15-38-15(B) and (C) were enacted to provide for the apportionment of percentages of fault among defendants. Importantly, S.C. Code Ann. § 15-38-15(C)(3)(a) states as follows:

> For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.

See, S.C. Code Ann. § 15-38-15(C)(3)(a). Therefore, where a plaintiff sues an individual and his employer, and the employer's liability is vicarious and contingent on the acts or omissions of that employee, S.C. Code Ann. § 15-38-15(C)(3)(a), using the mandatory term "must," mandates that the employee and employer be treated as a "single party" to determine the allocated fault of all defendants.

S.C. Code Ann. § 15-32-220, which provides for the non-economic damages cap, must be read and construed together with S.C. Code Ann. § 15-38-15, which was adopted as party of the same legislative scheme and was, in fact, amended as part of Act No. 32. Thus, the two statutes are part of the same scheme and are also part of the same act. S.C. Code Ann. § 15-32-220, however, does not expressly explain the meaning and intent of the term "single" when referring to "a single health care provider," to whom a single non-economic damages cap applies. However, the meaning of "single health care provider" is readily discernible from the specific definition of "single party" as contained in S.C. Code Ann. § 15-38-15(C)(3)(a). To read the statutes as part of the same statutory scheme and enactment, the Court should construe "single health care provider" consistently with the definition of "single party." Therefore, a "single

health care provider" should be *inclusive of both the employee and employer* in cases such as this where the plaintiff sues a physician together with his employer under a vicarious liability theory. In the present case, the Respondent sued Dr. Gilleland for medical malpractice, and as the Complaint makes clear, the liability of Rock Hill Radiology was premised entirely on its status as Dr. Gilleland's employer. *See*, Complaint, ¶¶ 3, 8. (R. 25-26). Thus, in applying S.C. Code Ann. § 15-32-220, the Court should treat Dr. Gilleland and his practice as a "single health care provider" which is liable for a single cap of $431,865.00.

There are other rules of statutory construction that also support that interpretation. The South Carolina Noneconomic Damages Awards Act includes a definitional section in S.C. Code Ann. § 15-32-210. The term "health care provider" is defined to mean "a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist or similar category of licensed health care provider, *including* a health care practice, association, partnership, or other legal entity." S.C. Code Ann. § 15-32-210(5). (Emphasis added). Thus, the definition provides a list of the various types of health care practitioners, then uses the term "including" and then states the types of legal entities that such practitioners typically form. In contrast, the term of "health care institution" is defined to mean "an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home and a renal dialysis facility." S.C. Code Ann. § 15-32-210(4). That definition contains a list only and does not utilize the term "including" in any respect. In addition, the General Assembly was very careful to include the legal entities formed by practitioners as part of the definition of "health care provider" rather than as part of the definition of "health care institution." The use of the term "including" in the definition of "health care provider" has significance. If the General Assembly had intended to simply make a list of every practitioner or medical entity that qualifies as a "health care

provider," there would have been absolutely no reason to break up that list with the use of the term "including." Moreover, the General Assembly chose to identify the medical entities as part of the definition of "health care provider" rather than the definition of "health care institution" (even though an "entity" is more synonymous with an "institution" than a "person").

Again, the use of the term "including" holds the key. There is considerable authority addressing the meaning of the term "including" in statutory language, but there is almost none in South Carolina. In the case of *Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991), this Court looked at the words "shall include" in the Unfair Trade Practices Act and relied on language from a Ninth Circuit case that stated "the word 'including' is not a word of all embracing definition but an illustrative application of general principles." 410 S.E.2d at 603. That is consistent with the meaning of "including" as applied by the United States Supreme Court in *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), where the Court wrote: "We recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." 314 U.S. at 99-100. Later, in the case of *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), the United States Supreme Court ruled the term "including" indicates an element that is "a part of the larger group," while the Court rejected the argument that "'including' means 'and' or 'as well as.'" 444 U.S. at 77, n.7. Other courts are in agreement in finding that the list that follows the term "including" is typically illustrative or inclusive. *See e.g., Beaver Dam Community Hospitals v. City of Beaver Dam*, 344 Wis.2d 278, 822 N.W.2d 491, 495 (Wis. Ct. App. 2012) ("'include' is a term of illustration or inclusion, not one of limitation or exclusion").

Thus, based upon this authority, the General Assembly's use of term "including" to break up the list of what constitutes a "health care provider" has specific significance. The term "including" is not a mere conjunction like "and" because otherwise there was no reason to break up the list to insert the term. Instead, the insertion of "including" was intended to make the list that followed including "health care practice" to be illustrative or inclusive of the list that preceded the word "including." Using the Supreme Court's explanation, "health care practice" was intended to be "a part of the larger group" that preceded the word "including." In that case, "health care practice" should not be construed as separate and apart from the provider itself. Instead, a "single health care provider," as used in S.C. Code Ann. § 15-32-220, is inclusive of both the physician and his medical practice – they should be treated as a single provider, not two separate providers. In effect, to treat Rock Hill Radiology as a separate "health care provider" from Dr. Gilleland would be to give no meaning or significance to the General Assembly's deliberate use of the term "including." For this additional reason, Dr. Gilleland and his practice should be treated as a "single health care provider" which is liable for a single cap of $431,865.00.

Lastly, an absolutely critical rule of statutory construction requires that "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State*, 383 S.C. 82, 678 S.E.2d 412, 417 (2009). This is also called the "doctrine of constitutional doubt." *United Student Aid Funds, Inc. v. South Carolina Department of Health and Environmental Control*, 349 S.C. 162, 561 S.E.2d 650, 653 (Ct. App. 2002). Stated similarly, "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional

interpretation." *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331, 333-334 (1977). *See also*, *State v. McGrier*, 378 S.C. 320, 663 S.E.2d 15 (2008); *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999).

The construction of "single health care provider" in S.C. Code Ann. § 15-32-220, as urged by the Respondent, would be unconstitutional and, as a result, should be rejected. The Respondent argues that Dr. Gilleland and Rock Hill Radiology should be treated as separate providers who are then each subject to a separate cap on non-economic damages. That construction would clearly be in violation of the Equal Protection Clauses of the South Carolina and United States Constitutions. The Equal Protection Clause provides "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." *See*, U. S. Const. amend XIV, § 1. "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Joseph v. South Carolina Department of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763, 771 (2016). "Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose." *Id*.

In essence, the Respondent's construction of "single health care provider" in S.C. Code Ann. § 15-32-220 would serve solely to penalize a physician for being part of a medical practice or otherwise for incorporating his practice. As a practical matter, a physician who is a sole practitioner is liable for one cap for an act of medical negligence, while a physician who practices with a group or has incorporated is liable for two caps for the same act of medical negligence. There is simply no rational basis for the law treating those two physicians who

commit the same act of medical negligence as liable for such disparate amounts. There is quite simply no legitimate governmental purpose that is served by that disparate treatment. This is particularly true when the law clearly treats a physician and his practice as a "single party" for purposes of determining an allocation of fault. *See,* S.C. Code Ann. § 15-38-15(C). Moreover, it would serve as a disincentive for medical practitioners to both incorporate and to join together in practices with other practitioners. There is no public policy benefit from creating such a disincentive. Further, there is no legitimate government purpose bolstered by this disparate treatment.

This Court is required under the "doctrine of constitutional doubt" – when faced with two susceptible statutory interpretations one of which is constitutional and the other is doubtful – to adopt the interpretation that is constitutional. In this case, the Appellants' interpretation of "single health care provider" in S.C. Code Ann. § 15-32-220 is clearly constitutional, while the Respondent's interpretation is not. The Appellants' interpretation also gives full effect to the entire statutory scheme adopted as part of the 2005 tort reform by the General Assembly. The Court is therefore respectfully requested to rule that Dr. Gilleland and Rock Hill Radiology are a "single health care provider" and, accordingly, are liable for a single cap of non-economic damages.

B. The applicable non-economic damages cap was $431,865.00.

The Respondent contends that the cap on non-economic damages as established by S.C. Code Ann. § 15-32-220(F) 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 Appellants, on the other hand, contend that the cap on non-economic damages is $431,865.00 which represents

the cap in effect in March 2015, when the Respondent's cause of action accrued.

There is no appellate authority that specifically addresses this issue. However, in similar contexts addressing the applicability of monetary caps or limits on damages, the South Carolina appellate courts have consistently applied the cap in effect on the *date of accrual* of the plaintiff's cause of action.

In the case of *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994), the Supreme Court held that the adoption of the Uniform Contribution Among Joint Tortfeasor's Act impliedly repealed the monetary caps under the Tort Claims Act. Those caps were reenacted in part by 1994 Act No. 497 and later in whole by 1997 Act No. 155. In determining when the reenacted caps applied, the Supreme Court concluded that "the date of accrual is the determinative date." *Williamson v. South Carolina Insurance Reserve Fund*, 355 S.C. 420, 586 S.E.2d 115, 118 (2003). In *Williamson*, the caps were reenacted effective June 14, 1997. The plaintiff's complaint was not filed until October 20, 1997; however, the negligent acts and hence the accrual of the cause of action occurred on January 3, 1997. The Supreme Court thus concluded that there were no caps applicable to that case. Neither the date of filing nor the date of the verdict were determinative. Instead, the applicability of the caps and their limits were established on the date of accrual. *See also, Brabham v. City of Columbia,* 293 S.C. 266, 360 S.E.2d 144, 144 (1987) ("the date the incident occurred was determinative of the applicability of the *McCall v. Batson* decision governing sovereign immunity and recovery limitations and not the date on which the complaint is filed").

This authority demonstrates that the date of accrual is determinative of the amount of the cap on non-economic damages as established by S.C. Code Ann. § 15-32-220(F) in a particular case. In the present case, the Respondent's cause of action accrued in March 2015, and as a

result, the Court is respectfully requested to rule that the applicable cap is $431,865.00, which is the cap in effect in 2015.[3]

VII. The trial court 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 Appellants. 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 Appellants. Likewise, there is no dispute that the injuries claimed against Amisub are the same as the injuries claimed against the Appellants. Thus, the parties agree that the Appellants 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). The parties disagree, however, as to the amount of the set-off for each cause of action.

[3] Nonetheless, even if the Appellants are not treated as a "single health care provider," Rock Hill Radiology Associates is not liable for more than ten percent of either verdict, meaning $27,66.67 for the survival action and $55,666.67 for the loss of consortium claim.

The Respondent concedes 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 Appellants contend, however, that 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 court, and the parties should be bound by that agreement. As indicated, the Respondent concedes that, when the settlement was placed on the record, the intent of the parties was to apportion 90% to the loss of consortium claim and 5% each to both the survival and wrongful death claims. (R. 97). During the settlement approval hearing held ten days later, the Respondent did not dispute that was the agreement as to allocation but only claimed there was "uncertainty at that time." (R. 907). The Respondent's counsel did not elaborate as to the nature of the

"uncertainty." (R. 907). Nonetheless, in response to the post-trial motions, the Respondent then changed course and referred to the apportionment as a "suggestion." (R. 97). Obviously, after the verdict, when the Respondent knew that the jury returned a defense verdict on the wrongful death claim, the Respondent sought to change the agreement so that the $250,000 settlement would be allocated equally between the three claims.

The Supreme Court has held that a court when applying a set-off should give effect to the settling parties' agreement if that agreement is bona fide and reasonable. *See, Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015). Here, the trial court allowed the Respondent to alter that agreed upon allocation after the verdict was returned and after she knew the result from the trial. That is inherently unfair and inequitable and is unsupported by any existing South Carolina case law. Not surprisingly, the Respondent cited no case law in the trial court supporting her position. In short, the Court should give effect to the settling parties' original agreement and grant a set-off of $225,000 for the loss of consortium claim and $12,500 for the survival claim.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Geoffrey T. Gilleland, M.D. and Rock Hill Radiology Associates, LLC respectfully request that the Court reverse the orders issued by Circuit Court Judge Daniel D. Hall denying the Appellants' motions for directed verdict, JNOV, and new trial absolute and remand for entry of judgment as a matter of law in favor of the Appellants, or alternatively, a new trial absolute. In the alternative, the Appellants request a greater set-off of the settlement reached by the Respondent with Amisub of South Carolina, Inc. 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.

Respectfully submitted,

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September 1, 2022

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, M.D. certify that the Final Brief of Appellants complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants Rock Hill Radiology Associates, LLC, and Geoffrey T. Gilleland, M.D. certify that the Final Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellants Rock Hill Radiology Associates, LLC and Geoffrey T. Gilleland, M.D., does hereby certify that service of the **Final Brief of Appellants** was made upon all counsel of record by email only this the 1st day of September 2022 as follows:

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