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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2020-000838

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 the	…….	Appellants.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Rita Pratt initiated this medical malpractice action by filing an October 25, 2016 complaint alleging medical malpractice-based survival, loss of consortium, and wrongful death claims against Appellants Rock Hill Radiology Associates, LLC ("Rock Hill Radiology") and Geoffrey T. Gilleland, MD. (R. p. 28-29 ¶¶ 15-20).[1] Ms. Pratt's claims, asserted in both her individual capacity and as the personal representative of her husband William Pratt's estate, arose out of medical care Mr. Pratt received while a Piedmont Medical Center ("PMC") patient in March 2015. Ms. Pratt alleged a teleradiology company (Virtual Radiologic Corporation ("Virtual Radiology")) procured by Rock Hill Radiology to interpret Mr. Pratt's March 2, 2015 chest CT scan failed to identify and report nine non-displaced rib fractures. (R. p. 26 ¶¶ 7-8). Ms. Pratt further alleged that, while Rock Hill Radiology agent Dr. Gilleland's later interpretation identified the fractured ribs, he failed to call the PMC emergency room to notify Mr. Pratt's treatment providers of a substantial discrepancy between his interpretation of the scan and the initial Virtual Radiology read. (R. p. 26 ¶ 9). Mr. Pratt was discharged home without treatment for his broken ribs. (R. p. 26 ¶ 10). Two days later, Mr. Pratt was seen at Carolinas Medical Center ("CMC") facilities in Pineville and Charlotte, North Carolina. (R. pp. 26-27 ¶¶ 11-12). Mr. Pratt passed away on March 23, 2015. (R. p. 27 ¶ 13).

Ms. Pratt's claims were tried before a jury and the Honorable Daniel D. Hall on February 3-10, 2020. During the trial Ms. Pratt reached a settlement with PMC and agreed to dismiss her claims against Nurse Heyward. (R. p. 565). Also during trial, the circuit court directed a verdict in

[1] Ms. Pratt's action was later consolidated with claims against PMC, one of its emergency room nurses (Jaleesa Heyward, RN). the emergency room physician who treated Mr. Pratt at PMC (Jonas Varaly, DO) and the medical practice for whom he worked (South Carolina Emergency Physicians, LLC). (R. pp. 18-24).

favor of South Carolina Emergency Physicians, LLC. (R. p. 516). On February 10, 2020, the jury entered a verdict with the following findings:

- The preponderance of the evidence showed Rock Hill Radiology and Dr. Gilleland (but not Dr. Varaly) deviated from the standard of care (R. p. 3, Question No. 1);
- Rock Hill Radiology and Dr. Gilleland's deviations from the standard of care proximately caused Mr. Pratt's injuries with 90% attributed to Dr. Gilleland's conduct and 10% attributed to Rock Hill Radiology's conduct (R. pp. 3-4, Question No. 2);
- Ms. Pratt was entitled to $ 360,000 for her survival claim and $ 640,000 for her loss of consortium claim (R. p. 4, Question No. 3);
- Rock Hill Radiology and Dr. Gilleland both acted with recklessness or gross negligence in their treatment of Mr. Pratt (R. p. 4, Question No. 4); and
- Rock Hill Radiology and Dr. Gilleland's reckless, willful, and wanton misconduct was proved by clear and convincing evidence (R. p. 5, Question No. 5).

In a second deliberation, the jury declined to award punitive damages. (R. p. 5).

Following the trial, the circuit court approved Ms. Pratt's settlement with PMC on February 20, 2020. (R. pp. 7-11). On that same date, Rock Hill Radiology and Dr. Gilleland filed post-trial motions to which Ms. Pratt responded on April 7, 2020. (R. pp. 52-104). The post-trial motions were largely denied in a May 4, 2020, Form 4 Order. A set-off of $ 83,333.33 for each of the survival and loss of consortium claims was granted. (R. pp. 12-14). Rock Hill Radiology and Dr. Gilleland moved to alter or amend this order on May 5, 2020. (R. pp. 125-29). Following a hearing, this motion was denied on June 25, 2020. (R. pp. 15-17). A notice of appeal was filed on July 6, 2020.

STATEMENT OF THE FACTS

Bill Pratt fell down a flight of stairs at his daughter's Rock Hill hone on March 2, 2015. (R. pp. 335-36). Rushed by ambulance to PMC's emergency room, Mr. Pratt was initially treated by emergency room physician Dr. Jonas Varaly (of South Carolina Emergency Physicians, LLC) and PMC nurse Jaleesa Heyward. (R. pp. 480-81). Since Mr. Pratt was suffering from lower back,

right shoulder, and bilateral rib pain (PMC EMS Run 011), a number of diagnostic tests were ordered including a chest CT scan. (R. p. 481).

These tests were ordered and conducted during the overnight hours and, as a result, they were not read onsite. In March 2015, PMC had an exclusive services contract tasking Rock Hill Radiology with providing all radiology services for PMC patients 24 hours per day, 7 days per week. (R. p. 145). Rather than assigning its own radiologists to work overnight hours, Rock Hill Radiology procured teleradiology services from Virtual Radiology for PMC radiology studies presented for interpretation between the hours of 11 p.m. and 7 a.m. (R. p. 656). Thus, Mr. Pratt's March 2nd chest CT was initially read remotely by a Virtual Radiologist physician who, in describing the bones in Mr. Pratt's chest, erroneously reported "[n]o acute fracture." (R. p. 887). In reliance on this inaccurate report, Dr. Varaly discharged Mr. Pratt without any treatment. (R. pp. 538-40).

When Dr. Gilleland arrived at PMC a few hours later, he too read Mr. Pratt's chest CT. His report documented four "nondisplaced left lateral . . . rib fractures" and five "right side anterior . . . rib fractures." (R. p. 880). Dr. Gilleland's interpretation represented a substantial discrepancy from the initial Virtual Radiology report. (R. pp. 175-76). Pursuant to established PMC practice, such a substantial discrepancy must be called in by the radiologist to the emergency room so that a patient can be summoned back to the hospital to treat his acute rib injury. (R. pp. 186-87). Dr. Gilleland refused to make that call. He reasoned that he understood the implications of Mr. Pratt's rib fractures better than Dr. Varaly could and that, due to a preexisting cancer diagnosis, Mr. Pratt was headed toward hospice care anyway. (R. pp. 678-80).

For the next two days, Mr. Pratt suffered immensely. After paramedics transported him home, Mr. Pratt was essentially immobile, moaning, and barely able to communicate. Tr. 321;

548-49). He could not rise to use the restroom, and his breathing became increasingly labored. (Tr. 339, 357, 500). His wife of thirty-plus years looked on in horror as Mr. Pratt's condition deteriorated. With Mr. Pratt's condition continuing to decline on March 4, 2015, an ambulance was called to transport him to CMC-Pineville. (R. pp. 486-87). There, another chest CT was performed and properly identified the nine non-displaced rib fractures Rock Hill Radiology and Dr. Gilleland failed to properly communicate. (R. p. 487). Mr. Pratt was transferred almost immediately to CMC's main facility in Charlotte. (Tr. 557). Despite weeks of inpatient care, Mr. Pratt passed away on March 23, 2015. (R. p. 900).

During the March 2020 trial of Ms. Pratt's medical malpractice claims, a number of experts explained how Rock Hill Radiology and Dr. Gilleland's errors led to such a tragic outcome. Expert radiologist Dr. Anthony Lupetin testified that Mr. Pratt's rib injury was overt, acute, and simply cannot be missed by any competent radiologist whether practicing within a hospital or remotely. (R. pp. 180-84). Moreover, since this was such an acute injury and stood in such sharp contrast to the erroneous initial Virtual Radiology report, both PMC policy and the standard of care demanded Dr. Gilleland make a call to the emergency room. (R. pp. 185-92). Emergency medicine expert Dr. Michael Chansky testified that emergency room physicians depend on radiologists to bring disparities between initial and final radiology reports to their attention. (R. p. 258). Dr. Chansky's testimony was further supported by Dr. Varaly, who told jurors that, had he known of Mr. Pratt's acute rib injury, Mr. Pratt would have admitted to a trauma center rather than sent home. (R. p. 555).

While Mr. Pratt got a proper diagnosis and high quality care two days after these March 2nd errors, experts also explained why the delay was so costly. Dr. Hiren Shah, Ms. Pratt's internal medicine and hospitalist expert, told jurors that broken ribs make breathing very painful and, if

left untreated, a patient will be unable to breathe deeply. (R. pp. 366-68). As a result, mucus will build up in the patient's lungs, and he will become vulnerable to infections including pneumonia. Instead of receiving oxygen and respiratory treatments in a trauma hospital, Mr. Pratt was sent home to suffer—all because his acute rib injury was not properly identified, reported, and communicated to his treatment providers. (R. pp. 372-84). Lying immobile without treatment for the following two days made the situation worse, a fact evidenced by negative changes in Mr. Pratt's vital signs between his PMC discharge on March 2nd and his CMC-Pineville visit on March 4th. (R. p. 378).

Following a six-day trial, Ms. Pratt's claims were submitted to the jury on February 10, 2020. When the verdict form was discussed and submitted, Rock Hill Radiology and Dr. Gilleland raised no on-the-record objection to its contents. (Tr. 706, 780). In light of the evidence summarized above, the jury returned a verdict against Rock Hill Radiology and Dr. Gilleland. Each was found to have acted with recklessness or gross negligence and proximately caused much of the damages sought in Ms. Pratt's claims. (R. pp. 3-4). Although Ms. Pratt's attorneys sought $ 5 million in damages (R. p. 167), the jury awarded a total of $ 1 million with $ 360,000 allocated to the survival and $ 640,000 to compensate Ms. Pratt for her loss of consortium. (R. p. 4). After the verdict was entered, Rock Hill Radiology and Dr. Gilleland raised no objections and failed to make a motion to resubmit the matter for further deliberation. Accordingly, the jury was discharged and judgment was entered in Ms. Pratt's favor. Other than granting Rock Hill Radiology and Dr. Gilleland a set-off ($ 83,333.33 each for the survival and consortium claims), the circuit court denied all post-trial motions. (R. pp. 12-17). This appeal followed.

STANDARD OF REVIEW

Appellants Rock Hill Radiology and Dr. Gilleland move for a new trial absolute and for judgment non obstante veredicto ("JNOV"). A motion for new trial absolute based on the amount of a jury verdict may be granted only if the verdict amount is "so grossly . . . excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, corruption, or some other improper motives." Brinkley v. S.C. Dep't of Corrections, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). A JNOV motion must be denied "where the evidence yields more than one inference" on the challenged issue. Rogers v. Norfolk Southern Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). The Court must view the evidence and resulting inferences in the light most favorable to the non-moving party and may grant a motion for JNOV when the evidence supports only one inference. Gibson v. Bank of Am., N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009). In considering a JNOV motion, a court is concerned with the existence of evidence, not its weight. A court considering a JNOV does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. Curcio v. Caterpillar, Inc., 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). Finally, a motion for JNOV is the renewal of a directed verdict motion and cannot raise grounds beyond those stated in the earlier motion. Roland v. Palmetto Hills, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992). In sum, "[t]he jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." Curcio, 355 S.C. at 320, 585 S.E.2d at 274.

ARGUMENT

1. **The jury's survival and loss of consortium verdicts are well supported by expert opinions, treating physician testimony, and medical records entered in evidence at trial.**

The jury determined Rock Hill Radiology and Dr. Gilleland recklessly breached their legal duties to Mr. Pratt when, among other things, Dr. Gilleland recognized Virtual Radiology substantially misread Mr. Pratt's chest CT scan but failed to communicate the error to Mr. Pratt's treating physician. (R. p. 3, Question No. 1; R. p. 4, Question No. 4; R. p. 5, Question No. 5). The jury also answered in the affirmative on proximate cause. (R. p. 3, Question No. 2). These verdicts were well supported by the documentary and testimonial evidence presented at trial. Accordingly, the circuit court correctly denied Rock Hill Radiology and Dr. Gilleland's directed verdict and JNOV motions.

A motion for directed verdict is not a means for a party to keep a genuinely disputed issue from the jury, and JNOV is not a tool for non-prevailing parties to overturn a verdict with which they disagree. Rock Hill Radiology and Dr. Gilleland must show no evidence supports the jury's liability findings on the survival and loss of consortium claims. Rogers, 356 S.C. at 92, 588 S.E.2d at 90. However, Rock Hill Radiology and Dr. Gilleland's brief does not discuss any of the expert or treating physician testimony in any detail. Instead, the brief broadly claims Rock Hill Radiology and Dr. Gilleland's errors caused no losses because Mr. Pratt was hospitalized two days later at a different facility. Specifically, Rock Hill Radiology and Dr. Gilleland conclude the two-day delay in diagnosis attributable to their errors was harmless because "there is no evidence that the rib injury would have been treated any differently in those two days." (Appellants' Br. at 9). That statement is objectively false. Rock Hill Radiology and Dr. Gilleland may disagree with Ms. Pratt's

experts on how a timely diagnosis would have affected Mr. Pratt's care, but they cannot deny such testimony was properly presented at trial.

First, Ms. Pratt presented substantial evidence to show how much Mr. Pratt's condition worsened over the disputed two-day period. Dr. Anthony Lupetin, Ms. Pratt's diagnostic radiology expert, presented Mr. Pratt's chest CTs from March 2 and 4, 2015, side-by-side to show the concerning changes in Mr. Pratt's lung anatomy. (R. pp. 176-77). In just two days, Mr. Pratt's lung volume had decreased and his bronchi walls were thickening in a way that suggested he was developing pneumonia. (R. p. 176, line 23 – p. 177, line 6); see also R. p. 201, lines 5-11 (March 4th image shows "the lung has collapsed"). Mr. Pratt's worsening condition was just as evident from the vital signs recorded in his medical records. Dr. Hiren Shah, Ms. Pratt's internal medicine and hospitalist expert, walked jurors through a chart summarizing medical records that showed how Mr. Pratt's respiratory rate, body temperature, and blood pressure rose sharply and how his oxygen level fell precipitously. (R. pp. 375-79).

	Piedmont (March 2)	**CMC Pineville (March 4)**
Resp. Rate	16	28 (high)
BP	134/76	173/85 (high)
Oxygen level	98%	92% (low, and on o2)
Temp	98.3	100.2 (high)
WBC	Not measured	12.7 (high)
On Oxygen?	No	Yes- 6 L/ min to 15 l/min
Breath Sounds	Clear	Coarse
Lungs on CT	No collapse	Both lungs collapsed

The drop in Mr. Pratt's oxygen level was an especially concerning sign of a rapidly developing lung ailment. At one point during this two-day period, Mr. Pratt's oxygen saturation reading fell to just 80%, a clear sign of breathing problems. (R. p. 376, lines 11-22). In fact, when Mr. Pratt was properly diagnosed at CMC-Pineville on March 4th, supplemental oxygen was required. (R. p. 376, line 25 – p. 377, line 2). Clinically, these are all very concerning developments. Dr. Shah explained how this collection of vital sign readings showed that mucus was building up in Mr. Pratt's lungs, his body his attempting to mount a response to a burgeoning pneumonia infection, and one of his lungs was starting to collapse. (R. p. 383, line 19 – p. 384, line 6).

At home with Mr. Pratt, his family members witnessed first-hand how much the damage the delay in diagnosis was causing. Pary Hart (Mr. Pratt's daughter) observed that, as concerning as Mr. Pratt's condition was on March 2nd, it was considerably worse on March 3rd. (R. p. 339, lines 22-24; R. p. 351, line 17 – p. 352, line 1). His breathing was increasingly labored ("very light, very shallow breaths") and there was blood in his urine (R. p. 339, line 25 – p. 340, line 4); (R. p. 355, lines 17-18 (describing rise and fall of Mr. Pratt's chest as "very shallow"). Ms. Pratt described her husband's condition similarly. He was in considerably pain, unable to move, and his breathing was "very slow." (R. p. 485, lines 14-25; R. p. 500, lines 16-25).

Rock Hill Radiology and Dr. Gilleland contend that Mr. Pratt's condition would not have been treated differently if he had been properly diagnosed on March 2nd. (Appellants' Br. at 9-10). In other words, they argue the Pratts suffered no damage because Mr. Pratt was the same lying on his daughter's couch as he would have been under the active care of physicians in a hospital setting. Substantial evidence rejects that conclusion. Rock Hill Radiology and Dr. Gilleland's failure to communicate the error in the initial read of Mr. Pratt's March 2nd chest CT had massive implications on the course of his medical treatment. Dr. Jonas Varaly, the emergency room

physician who discharged Mr. Pratt in reliance on the erroneous initial read, testified that knowing the true nature of Mr. Pratt's rib injury would have changed his decision. (R. p. 554, line 24 – p. 555, line 8) (Dr. Varaly would have worked to have Mr. Pratt admitted to a trauma hospital "if I had an indication of the fracture" in his ribs).

Dr. Varaly's testimony was consistent with Ms. Pratt's expert opinions. Dr. Michael Chansky, an expert in emergency medicine, told jurors that the type of rib fractures Mr. Pratt suffered would require immediate inpatient treatment 100% of the time. (R. p. 266, lines 2-10). Thus, the difference between what Dr. Varaly knew (based on the erroneous initial read of Mr. Pratt's March 2nd chest CT) and what Dr. Gilleland knew but failed to communicate (9 non-displaced rib fractures) was hugely consequential. If the proper information had been conferred by Dr. Gilleland to Dr. Varaly, it undoubtedly would have "chang[ed] the therapy of the patient . . . from discharge to likely admission to a trauma center." (R. p. 258, line 22 – p. 259, line 1). Even if Dr. Gilleland had communicated the crucial information after Mr. Pratt had been discharged, any competent emergency room physician would have called Mr. Pratt back in because his condition "absolutely required very aggressive treatment" to minimize the risk of complications. (R. p. 263, lines 12-19).[2]

The jury was not left to wonder what that "aggressive treatment" would look like. Dr. Shah described in detail the treatment modalities Mr. Pratt would have received had he been admitted to a trauma center on March 2nd. (R. pp. 368-71). First, he would have undergone a breathing treatment called incentive spirometry, which involves a patient blowing into a tube several times per hour to make sure his lungs are expanding with each breath. (R. p. 369, lines 4-12). Second,

[2] Even Rock Hill Radiology and Dr. Gilleland's own internal medicine and critical care expert agreed Mr. Pratt's clinical picture worsened during the disputed two-day period. (R. p. 643, lines 19-22).

since the lung issues secondary to Mr. Pratt's rib injuries were negatively affecting his breathing, a trauma hospital could provide him supplemental oxygen through a nasal cannula. (R. p. 369, lines 13-19). Third, the hospital would take further efforts to keep Mr. Pratt's lungs expanding by offering nebulizers, i.e. medications delivered in steam form to open up the lungs. (R. p. 369, line 20 – p. 370, line 4). Fourth, the hospital would use a "cough assist" device attached to Mr. Pratt's face to further facilitate inhaling and exhaling. (R. p. 370, lines 4-11). Fifth, a trauma hospital would have the capacity to carefully monitor Mr. Pratt's oxygen levels to determine which therapies were working and which additional options should be considered. (R. p. 370, line 12 – p. 371, line 8).

Obviously, none of this personnel, equipment, or therapy was available on Mr. Pratt's couch where he lay suffering from March 2-4, 2015. Thus, Rock Hill Radiology and Dr. Gilleland's claim that Mr. Pratt's injury would have been treated no differently in a hospital simply has no basis in the evidence. Nor does their suggestion that these therapies would have had no impact on Mr. Pratt's pain and suffering (and Ms. Pratt's related consortium losses). Dr. Shah testified that the five treatment modalities would have prevented the buildup of secretions in Mr. Pratt's lungs. (R. p. 372, line 25 – p. 373, line 4). In contrast, lying on a couch for two days meant Mr. Pratt "wasn't moving air" efficiently through his lungs and his condition only worsened. (R. p. 373, lines 4-21).

Rock Hill Radiology and Dr. Gilleland do not address any of this evidence in arguing they were entitled to JNOV. Instead, they focus on two impertinent and inaccurate points. First, the brief devotes most of its time to arguing the verdict shows the jury did not find Rock Hill Radiology and Dr. Gilleland's reckless misconduct to have been the cause of Mr. Pratt's death. (Appellants' Br. at 7-8). Even if this argument were valid, it is unclear how it would support JNOV on the

survival and loss of consortium claims, neither of which require proof that a defendant's conduct caused death. Second, Rock Hill Radiology and Dr. Gilleland note that failing to properly communicate the results of a radiological study causes no harm if having the proper information would not have changed the attending physicians' approach in caring for the patient. (Appellants' Br. at 8-9) (citing Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010)).

However, Hoard bears little resemblance to this case. There, the defendant radiologist was accused of negligently failing to identify that a catheter placed inside a newborn's chest was "malpositioned." Hoard, 387 S.C. at 544, 694 S.E.2d at 3. The improperly-placed catheter eroded the newborn's heart wall and led to her death. Id. at 543, 694 S.E.2d at 3. The South Carolina Supreme Court held that, even if the radiologist's report was insufficient, it did not proximately cause injury because the newborn's neonatologist was aware of the misplaced catheter and chose not to address it because he made the "intentional and independent" clinical judgment that repositioning the catheter would do more harm than good. Id. at 548, 694 S.E.2d at 5. In contrast, Mr. Pratt's treating physician (Dr. Varaly) *was not* aware that the initial read of Mr. Pratt's March 2nd chest CT was incorrect and that Mr. Pratt actually had nine fractured ribs. (Tr. 603). Moreover, Dr. Varaly did not make an "intentional and independent" decision that the rib injury should not be treated. In fact, Dr. Varaly expressly testified that, had he been aware of the rib fractures, he would have admitted Mr. Pratt to a trauma hospital. (R. p. 554, line 24 – p. 555, line 8); see also (R. p. 258) (Dr. Chansky testifying that emergency room physicians depend on the radiologist to call us with the discrepancy between an initial and later read of a radiological study). Thus, unlike Hoard, Dr. Gilleland's failure to communicate directly affected Mr. Pratt's treatment course and was a proximate cause of the injuries sought in Ms. Pratt's claims.

In sum, the circuit court correctly denied Rock Hill Radiology and Dr. Gilleland's motions for directed verdict and JNOV on the survival and loss of consortium claims. JNOV would be appropriate only if there was no evidence of a causal connection between Rock Hill Radiology and Dr. Gilleland's errors and the losses sustained by Mr. and Ms. Pratt prior to his death. Mr. Pratt's treating physicians, Ms. Pratt's experts, and medical records presented at trial all show a direct and proximate connection between the mishandled March 2nd chest CT report and the damages the jury awarded Ms. Pratt.[3]

2. Rock Hill Radiology and Dr. Gilleland's challenge to the jury's wrongful death verdict is untimely and irrelevant.

Rock Hill Radiology and Dr. Gilleland next posit that the jury's verdict is fatally inconsistent. They insist the jury must have been confused to find for Ms. Pratt on the breach and proximate cause elements of her negligence-based claims while also leaving the damages section blank for one of the three claims. However, if Rock Hill Radiology and Dr. Gilleland wanted to pursue this misguided argument, they were required to do so before the jury was discharged so any perceived inconsistency could be addressed by additional jury deliberations. Moreover, the jury's verdict is not inconsistent as it is critically different than the cases on which Rock Hill Radiology and Dr. Gilleland rely.

As this court recently stated, "[s]ome post-trial motions—such as those seeking to correct or clarify an inconsistent verdict—must for practical reasons be made before the jury is discharged, or they are forever lost." Ex Parte Travelers Home & Marine Ins. Co. v. Stringfellow, 427 S.C.

[3] Rock Hill Radiology and Dr. Gilleland also err in arguing that JNOV on the survival claim would necessarily doom Ms. Pratt's loss of consortium claim. (Appellants' Br. at 10). Under South Carolina law, personal injury and loss of consortium claims are "separate and distinct" such that "a ruling on one does not bar . . . recovery on the other claim." White v. U.S., 907 F. Supp. 2d 703, 707 (D.S.C. 2012) (quoting Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215, 227 (Ct. App. 2002)).

238, 242, 830 S.E.2d 718, 720 (Ct. App. 2019). Stringfellow built on longstanding precedent holding that a court "ha[s] no authority" to address an allegedly inconsistent verdict unless the aggrieved party asks for resubmission to the jury. Longshore v. Saber. Sec. Servs., Inc., 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005); see also Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 553, 560 S.E.2d 894, 896 (2002) (holding that party "waited too late to voice its objection"). As Stringfellow noted, requiring challenges to the consistency of a verdict before the jury leaves is a rule South Carolina courts have adopted for "practical reasons." 427 S.C. at 242, 830 S.E.2d at 720. The remedy for an allegedly inconsistent verdict is to resubmit the matter to the same jury. A party should not be permitted to hold back its challenge until after the jury is discharged in hopes of changing the remedy—i.e. getting a full new trial and brand new jury rather than resubmission to the same jury that just ruled in its opponent's favor.

That is effectively what Rock Hill Radiology and Dr. Gilleland seek here. When the jury's verdict was published, defense counsel was immediately given an opportunity to object but chose not to. (R. p. 799, line 24 – p. 800, line 4). Since Rock Hill Radiology and Dr. Gilleland attorney waived this opportunity, the circuit court discharged the jury. (R. p. 800, lines 5-25). While Rock Hill Radiology and Dr. Gilleland may argue they later requested ten days to file post-trial motions (R. p. 801, lines 7-9), that request came *after* the jury was discharged and it could not include any motion related to alleged verdict inconsistency. Stringfellow, 427 S.C. at 242, 830 S.E.2d at 720 (motion based on allegedly inconsistent verdict is "forever lost" if made after jury is discharged). Allowing Rock Hill Radiology and Dr. Gilleland to assert a belated challenge to the verdict and granting them a new trial would make bad policy and bad precedent. See Dykema, 348 S.C. at 554, 560 S.E.2d at 896 (holding that a party "should not be permitted to sit idly by while a verdict

erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, this invited by acquiescence").

Precedent cited in their brief demonstrates the process Rock Hill Radiology and Dr. Gilleland were required to follow. (Appellants' Br. at 11-12) (citing Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000)). Stevens affirmed this Court's holding that, "*upon request*, the trial court should have resubmitted the matter to the jury" with further instructions to resolved the perceived inconsistency. 342 S.C. at 49, 536 S.E.2d at 664 (emphasis added). The appellate courts only considered the possibility of a full new trial because the aggrieved party moved for resubmission before the jury was discharged, and the circuit court denied the motion. Id. In fact, Stevens's requirement of a pre-jury discharge objection has been recognized as a guiding principle for addressing allegedly inconsistent verdicts. See Dykema, 348 S.C. at 554, 560 S.E.2d at 896 (reading Stevens to hold that a circuit court should take action on an inconsistent verdict by resubmitting to the jury only "**when the issue is raised**" before the jury is discharged) (emphasis in original).

Rock Hill Radiology and Dr. Gilleland would have the court look past the Stevens requirement, its reiteration by the Supreme Court in Dykema, and this court's recent statement in Stringfellow in favor of a single older, isolated precedent to hold that a timely objection was not required to obtain a full new trial. Appellants' Br. at 11 (citing Vinson v. Jackson, 327 S.C. 290, 491 S.E.2d 249 (1997)). However, Vinson is not the Supreme Court's most up-to-date statement on the matter, and condoning an untimely verdict challenge would create significant judicial inefficiencies by creating the possibility of a second full trial when a timely objection and resubmission of the issue to the jury would address any inconsistency concerns. Plus, Vinson even recognized a trial court has little power to address an allegedly defective verdict once the objecting

party has allowed the jury to be discharged. 327 S.C. at 293, 491 S.E.2d at 250. Rather than contorting Vinson to sanction Rock Hill Radiology and Dr. Gilleland's belated verdict inconsistency argument, the court should follow the Supreme Court's unambiguous post-Vinson principle from Dykema: a party who believes a verdict is inconsistent may not allow the jury to be discharged without objecting in hopes of later gaining a reversal on appeal. 348 S.C. at 553, 560 S.E.2d at 896.

Even if the Court were to reach its merits, the verdict inconsistency argument fails. Whether to grant Rock Hill Radiology and Dr. Gilleland a new trial was a matter directed to the circuit court's discretion. Austin v. Stokes-Craven Holding Co., 387 S.C. 22, 49, 681 S.E.2d 135, 149 (2010) (citing Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996)). When Rock Hill Radiology and Dr. Gilleland raised their belated verdict inconsistency argument, the circuit court had a duty to sustain the jury's findings so long as "a logical reason for reconciling them can be found." Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967). A new trial should not be granted unless a verdict is "irreconcilably inconsistent." Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985).

The jury's verdict in this case is not inconsistent. The verdict form included single questions on the breach and proximate cause elements of Ms. Pratt's three negligence-based claims. (R. p. 3, Questions No. 1-2). The jury was then asked in a single question to state the amount of any damages for each of the three claims. (R. p. 4, Question No. 3). Rock Hill Radiology and Dr. Gilleland's brief does not suggest they objected to this portion of the verdict form. Thus, if the jury found any of the three claims lacking based only on the damage element, the sole and proper way to deliver that finding was to leave blank the damages line for that particular claim.

That is the verdict the jury rendered here. Rock Hill Radiology and Dr. Gilleland each recklessly violated their legal duties and proximately caused some but not all the harm Ms. Pratt alleged. Interpreting the verdict this way is consistent with the arguments made at trial. Ms. Pratt's counsel requested $ 5 million in damages (R. p. 167), and, finding only a portion of the losses should be awarded, the jury returned a $ 1 million verdict. The cases on which Rock Hill Radiology and Dr. Gilleland rely are very different. The Vinson verdict was deemed "internally inconsistent and unexplainable" because the jury returned that expressly stated "We . . . find for the defendant" while awarding an amount that could have only corresponded to damages sought in the plaintiff's claim. 327 S.C. at 292, 491 S.E.2d at 250.[4] All Vinson stands for is the notion that it is "internally inconsistent" for a verdict to expressly state the jury "finds for" one party while also making an award that could only mean a finding for the opposing party. That situation does not exist here. The jury never claimed to "find for" Rock Hill Radiology and Dr. Gilleland while also purporting to award Ms. Pratt damages. Instead, the jury consistently found Rock Hill Radiology and Dr. Gilleland were guilty of reckless misconduct but simply chose to award only a portion of the damages Ms. Pratt sought.

Stevens also presented a different situation. In that case, the jury considered wrongful death and survival claims on behalf of a teenage passenger who died when an underage intoxicated driver drove a vehicle into a creek. 342 S.C. at 49, 536 S.E.2d at 663. In a suit against the driver and his mother, the jury found both defendants liable but then awarded zero damages on *both* the wrongful death and survival claims. Id. Thus, all Stevens held is that a verdict is inconsistent when it finds liability but awards zero damages on all claims asserted. 342 S.C. at 52, 536 S.E.2d at 665. That,

[4] The defendant in Vinson had alleged a counterclaim but the verdict could not have intended to award damages on the counterclaim because it sought only property damages claim and the award was for more than five times what the defendant requested. 327 S.C. at 292, 491 S.E.2d at 250.

too, is not the situation presented here. The jury unambiguously found Rock Hill Radiology and Dr. Gilleland liable and then awarded a total of $ 1 million dollars in damages on some, but not all, of the claims Ms. Pratt alleged. That verdict is not inconsistent under Vinson and Stevens or any other South Carolina precedent.

Finally, even assuming Rock Hill Radiology and Dr. Gilleland's verdict inconsistency argument was timely and valid, they still have not shown why a new trial is warranted. Their brief devotes so much focus to Ms. Pratt's wrongful death claim even though judgment was only entered against Rock Hill Radiology and Dr. Gilleland on the survival and loss of consortium claims. In other words, Rock Hill Radiology and Dr. Gilleland have not shown any prejudice from the alleged verdict inconsistency and, for all these reasons, the circuit court correctly refused to order a new trial. See Steele v. Dillard, 327 S.C. 340, 343, 486 S.E.2d 278, 279 (Ct. App. 1997) (finding objecting party failed to establish it was prejudiced by trial court's failure to include a special interrogatory in verdict form); Rule 61, SCRCP (stating that no error or defect in any ruling or order is grounds for a new trial unless it "affect[s] the substantial rights of the parties").

3. Rock Hill Radiology and Dr. Gilleland's challenge to the verdict form's fault allocation question is untimely, was waived at trial, and is not supported by the evidence.

Mr. Pratt's pain and suffering as well as Ms. Pratt's loss of consortium damages were not just the product of Dr. Gilleland's failure to communicate to Mr. Pratt's treating physicians the substantial discrepancy between the initial and later interpretations of the March 2nd chest CT. Those losses would also have been avoided had the initial read by the company Rock Hill Radiology chose to hire (Virtual Radiology) not been so grossly inaccurate. Therefore, the evidence and arguments presented at trial fully support the circuit court's decision to list Rock Hill Radiology and Dr. Gilleland separately on the verdict form for fault allocation purposes. Rock Hill

Radiology and Dr. Gilleland's challenge to this portion of the verdict form was not made in a timely fashion at trial. Moreover, their attorney expressly told the circuit court Ms. Pratt was free to argue Rock Hill Radiology was liable for Virtual Radiology's errors, and counsel chose not to object as Ms. Pratt's lawyers repeatedly made this argument to the jury.

As with Argument No. 2, preservation issues should prevent the Court from reaching the merits of the challenge to the verdict form's fault allocation question. If Rock Hill Radiology and Dr. Gilleland believed the verdict form was flawed, they had a duty to make an objection on the record before the form was submitted to the jury. Gause v. Smithers, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013); Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding that by failing to object to a verdict form until after the verdict had been reached, a party failed to preserve any issue related to the verdict form); Hollis v. Armour & Co., 190 S.C. 170, 2 S.E.2d 681, 685 (1939) (finding objection that came for first time on motion for new trial "came too late and must be deemed to have been waived"). The trial transcript shows the circuit court held an in chambers conference with each party's counsel on proposed jury charges and the verdict form. (R. p. 706, lines 8-10). Once back in the courtroom, the parties were asked to place on the record any challenges to the charges and verdict form. Rock Hill Radiology and Dr. Gilleland's counsel objected to one proposed charge (R. p. 708, lines 12-20) but voiced no complaints regarding the fault allocation question or any other portion of the verdict form. After the jury charge was completed, the parties were given a second opportunity to make any motions related to the charges and verdict form. Rock Hill Radiology and Dr. Gilleland's counsel reiterated its challenge to one jury charge but otherwise made no objections. (R. p. 780, lines 23-24). Rock Hill Radiology and Dr. Gilleland's brief does not reference any on-the-record objection to the verdict form's fault allocation question that would permit them to raise that issue on appeal.

Rock Hill Radiology and Dr. Gilleland also consistently failed to object to Ms. Pratt's arguments faulting Rock Hill Radiology for Virtual Radiology's errors. During Ms. Pratt's closing argument, her attorney made the following statement to the jury:

> Now, let's go to standard of care violations by Rock Hill Radiology, because you'll see on the verdict form there are two separate Defendants; Dr. Gilleland and Rock Hill Radiology. So, what if someone asks you in the deliberation room, well, was there a standard of care violation by Rock Hill Radiology? Remind them about Virtual Radiology's misread in the middle of the night.
>
> Everybody agreed that Virtual Radiology messed up; they didn't catch the fractures that Dr. Gilleland caught just a few hours later. Should they bring that up, you remind them of that. If there's any – any issue at all about whether Rock Hill Radiology had a standard of care problem.
>
> If you all get together and talk and you -- you say to yourself that Dr. Gilleland was negligent or you say that Virtual Radiology is negligent, then you must also find against Rock Hill Radiology; that's going to be the law.

(R. p. 734, line 23 – p. 735, line 14). Rock Hill Radiology and Dr. Gilleland offered no objection to this argument. Then, during Ms. Pratt's rebuttal argument, her counsel told the jury as follows:

> Number 3, Dr. Gilleland should have picked up the phone, and I'm going to use his words, and call it in, the nine non-displaced rib fractures, because those were significant to Dr. Varaly, and had Dr. Varaly known about it, Mr. Pratt would have gone to a trauma hospital.
>
> **And then finally, had Virtual Radiology caught the fractures and put them in their report while Mr. Pratt was still at Piedmont Medical Center, Mr. Pratt would have ended up going to a trauma facility.**

(R. p. 755 lines 12-20) (emphasis added). Here again, Mr. Pratt argued distinct liability for Rock Hill Radiology based on Virtual Radiology's error and Rock Hill Radiology and Dr. Gilleland raised no objection to the argument. Similarly, no objection was raised when the circuit court reviewed the verdict form with the jury and charged jurors they were permitted to find liability

against "each Defendant," that they could allocate fault "for each of the Defendants," and that the jury "would have the three Defendants, you would assign a percentage of fault to those three." (R. p. 777, lines 9-21). Minutes later, Rock Hill Radiology was given an opportunity to offer objections and none was raised as to the verdict form or this pertinent portion of the jury charge. (R. p. 780). Thus, the current challenge to the verdict form's Question No. 2 was not raised and ruled on at the trial court, rendering it unpreserved for appeal.

Rock Hill Radiology and Dr. Gilleland offered no objection to these argument/charges perhaps because their attorney had expressly stated earlier in the trial that Ms. Pratt was permitted to argue Rock Hill Radiology was liable for Virtual Radiology's error. During an argument over the possible admission of Rock Hill Radiology's contract with Virtual Radiology, Ms. Pratt argued the contract was admissible evidence to support Ms. Pratt's claim that "Virtual [Radiology] is the responsibility of Rock Hill [Radiology], because they're the ones that hired them . . ." (R. p. 470, line 25 – p. 471, line 1). In response, Rock Hill Radiology conceded, **"*They can argue that.***" (R. p. 471, line 3) (emphasis added). This was a crucial concession from the moment it was made. The circuit court immediately acknowledged it as a concession. (R. p. 471, lines 8-9) ("He's indicating you are free to argue that, he's not going to object to that argument"). It is disingenuous for Rock Hill Radiology to argue on appeal that the jury should not have been able to consider Rock Hill Radiology's fault for Virtual Radiology's error when Rock Hill Radiology's counsel affirmed to the circuit court that this was a permissible argument.

What's more, this concession fatally undermines Rock Hill Radiology and Dr. Gilleland's argument that faulting Rock Hill Radiology for Virtual Radiology's error impermissibly extends beyond the claims Ms. Pratt pled in her complaint. (Appellants' Br. at 14-15). Virtual Radiology's error was not omitted from the complaint. (R. p. 26 ¶ 7). More importantly, even if the complaint

did not spell out Rock Hill Radiology's liability for this error in great detail, any "issues not raised by the pleadings [that] are tried by express or implied consent of the parties . . . shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. The concession by Rock Hill Radiology and Dr. Gilleland's during the trial is overwhelming proof Rock Hill Radiology's liability for Virtual Radiology's error was tried by express or implied consent. That was evident from the moment the concession was made. It was only because counsel made that concession that Ms. Pratt dropped her efforts to admit the contract to evidence. (Tr. 541, lines 10-14) ("based upon counsel's representation, if we're going to be able to argue and talk about Virtual being the responsibility of Rock Hill Radiology, then we're fine, we don't need the document"). Should Rock Hill Radiology and Dr. Gilleland now argue Ms. Pratt should have utilized Rule 15(b)'s procedure to amend her complaint to conform to the evidence, their own counsel's concession showed that motion was unnecessary because the parties agreed the argument was permitted.[5]

The court should also reject the argument that the circuit court "did not permit" Ms. Pratt to pursue liability against Rock Hill Radiology for Virtual Radiology's error. (Appellants' Br. at 15). The circuit court acknowledged counsel's concession that the argument was permitted and instructed the jury that it could find liability against any of the three defendants listed on the verdict form. (R. p. 471, lines 8-9; R. p. 777, lines 9-21). The rulings Rock Hill Radiology and Dr. Gilleland cite do not indicate otherwise. They rely first on a pretrial motion for partial summary judgment and then on a similar motion Ms. Pratt made after the jury charge. (Appellants' Br. at 14-15) (citing R. pp. 130-31 and R. p. 780, lines 8-10) (moving that court make finding on Rock

[5] Rule 15(b) also states that failure to make a motion to amend to conform to the evidence "does not affect the results of the trial of these issues."

Hill Radiology-Virtual Radiology relationship "as a matter of law"). There is a big difference between denying a motion for summary judgment and ruling on the merits of the movant's position. Denying summary judgment simply refuses to take the issue away from the jury, it in no sense prevents a party from presenting their argument to the jury. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379, 380 (1994); see also Jean Hoefer Toal et al., Appellate Practice in South Carolina 162 (3d ed. 2016) ("The denial of summary judgment does not finally determine anything about the merits of the case" as the matter on which judgment was denied "may be raised again later in the proceedings").

Finally, Rock Hill Radiology and Dr. Gilleland's objection to the verdict form's fault allocation question is flawed on the merits. Ms. Pratt did produce evidence from which a jury could determine Rock Hill Radiology was at fault for Virtual Radiology's conduct. Ms. Pratt's expert testified Virtual Radiology's initial read of Mr. Pratt's March 2nd chest CT was grossly inaccurate in that it missed an acute abnormality—i.e. nine non-displaced rib fractures. (R. pp. 178, 181-82). Moreover, the jury heard from Dr. Gilleland on the origin and nature of Rock Hill's Radiology relationship with Virtual Radiology. Rock Hill Radiology formed an exclusive radiology services contract with PMC and, seeking to avoid late night work, made the choice to bring in Virtual Radiology to read all PMC radiological images during the hours of 11 p.m. to 7 a.m. (R. p. 665, line 16 – p. 666, line 20). Virtual Radiology was only ever part of Mr. Pratt's story because Rock Hill Radiology chose to bring it in. That choice was made because, driven by profit, Rock Hill Radiology wanted all of PMC's radiology work but did not want to do it all itself. The jury was free to evaluate this evidence and was free to find Rock Hill Radiology liable for choices it made leading to the critical initial misread of Mr. Pratt's CT scan.

Rock Hill Radiology and Dr. Gilleland's reliance on S.C. Code Ann. § 15-38-15(c)(3)(A) (Appellants' Br. at 13-14) is also misplaced for two reasons. First, this provision requires a court to treat two defendants as one only when their misconduct is solely "in concert" or where one of the defendants' is responsible solely based on "vicarious liability" for the other. Since the trial included evidence of Rock Hill Radiology's liability for Virtual Radiology's error in addition to Dr. Gilleland's, Rock Hill Radiology's has distinct liability and section 15-38-15(c)(3)(A) does not apply. Second, the jury's verdict on a different question makes this provision inapplicable. The jury found Rock Hill Radiology and Dr. Gilleland were each guilty of reckless or grossly negligent misconduct. (R. pp. 4-5, Questions No. 4-5). Based on those findings, none of section 15-38-15's provisions apply in this case. S.C. Code Ann. § 15-38-15(F).

In sum, Rock Hill Radiology and Dr. Gilleland's challenge to the verdict form's fault allocation was not properly preserved and is fatally undermined by counsel's admission during trial. Moreover, Ms. Pratt's trial evidence created a jury question on Rock Hill Radiology's liability for Virtual Radiology's error, and there is no legal basis for treating Rock Hill Radiology and Dr. Gilleland as a single defendant for fault allocation purposes.

4. A $ 640,000 loss of consortium award was a reasonable evaluation of the intangible losses Ms. Pratt suffered.

Sifting through five days of testimony, including vivid descriptions of the Pratts' strong marriage and Ms. Pratt's agony in witnessing her husband's premature decline, the jury awarded Ms. Pratt $ 640,000 for her loss of consortium. (R. p. 4, Question No. 3). Rock Hill Radiology and Dr. Gilleland argue this award is excessive, and they should be granted a new trial. However, this argument underestimates both the legal standard to obtain a new trial and the deference appellate courts must offer the jury's determination and circuit court's post-verdict review. In short, the loss

of consortium award is supported by the evidence, consistent with awards in other cases of intangible losses, and shows no signs of improper passion or prejudice.

Rock Hill Radiology and Dr. Gilleland must meet a high standard to push aside a jury's damage award for a new trial. Since Rock Hill Radiology and Dr. Gilleland pursued only a motion for new trial absolute rather than new trial nisi, they cannot prevail by arguing the verdict was "merely . . . excessive" but must instead demonstrate the verdict was "grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993); see also Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004) (requiring courts to distinguish between verdict that is "unduly liberal" and one "actuated by passion, caprice, or prejudice"). A verdict is not excessive if it "may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained." Kunst v. Loree, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018).

Additionally, an appellate court reviews only a cold trial transcript while the jury and judge received first-hand the witnesses' descriptions of the size and scope of what Ms. Pratt has lost. Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) (citing Daniel v. Sharpe Constr. Co., 270 S.C. 687, 244 S.E.2d 312 (1978) ("The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than" Supreme Court reviewing a cold trial transcript)). Accordingly, this Court affords substantial deference to both jury and circuit court. Mills v. S.C. State Ports Auth., 435 S.C. 213, 865 S.E.2d 910 (Ct. App. 2021) (quoting Burke v. AnMed Health, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct. App. 2011) (noting "highly deferential" standard of review); Welch v. Epstein, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) (circuit court's decision to deny new trial based on verdict

amount "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law"). Deference must be especially high when reviewing an award for intangible damages like those at issue in a loss of consortium claim. Mills, 435 S.C. at 227, 865 S.E.2d at 917 (citing Rush, 310 S.C. at 381, 426 S.E.2d at 806).

Ms. Pratt's consortium damages include all losses of her husband's "companionship, aid, society and services" attributable to Rock Hill Radiology and Dr. Gilleland's misconduct. S.C. Code Ann. § 15-75-20; Davis v. Tripp, 338 S.C. 226, 239, 525 S.E.2d 528, 535 (Ct. App. 1999). Her claim extended to both "direct emotional or physical injury inflicted by the tortfeasor" and "consequential damages resulting from the injuries suffered by" Mr. Pratt. Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 157-58, 533 S.E.2d 597, 604-05 (Ct. App. 2000). More specifically, the $ 640,000 award covered "the comfort, aid, advice, and solace, the rendering of material services, and any other elements that normally arise in a close, intimate, and harmonious marriage relationship." Schumacher v. Cooper, 850 F. Supp. 438, 453 (D.S.C. 1994) (citing Ozzello v. Peterson Builders, Inc., 743 F. Supp. 1302, 1315 (E.D. Wis. 1990)).

The evidence presented at trial supported a substantial loss of consortium award. All of the available evidence showed the Pratts had an unusually close and harmonious marriage. Bill and Rita Pratt were married for 35 years and parented three children. (R. p. 472, line 19 – p. 473, line 4). For 28 of those years, the Pratts were not just spouses but also business partners. (R. p. 474, lines 6-17). Mr. Pratt, a former professional musician, would spontaneously compose songs about his beloved wife and children. (R. p. 473, lines 19-25). Ms. Pratt told jurors that Mr. Pratt was "amazing"—a family leader known for being "[v]ery compassionate, strong, [and] loving." (R. p. 473, lines 8-18). Ms. Pratt closed her testimony by describing her husband as "one of a kind," irreplaceable because he was "too unique, too creative" with "too much compassion." (R.

p. 489, lines 15-19). The Pratts' marriage was both a romantic and practical bond. They "relied on each other for everything." (R. p. 475, line 10).

In the wake of Mr. Pratt's erroneous discharge from PMC (fueled by Rock Hill Radiology and Dr. Gilleland's errors), the companionship Ms. Pratt enjoyed with her husband was severely interrupted. Instead of convalescing and receiving treatment in a hospital's trauma unit, Ms. Pratt's losses began when she had to watch Mr. Pratt suffer through an ambulance ride home. (R. p. 484, lines 17-22). Once at home, Mr. Pratt was not able to offer "comfort" or "solace" to his wife because he lay in pain largely immobilized on the couch. (R. p. 485, lines 14-22). The "aid" and "advice" Ms. Pratt was used to receiving from her husband was reduced to nothing because Mr. Pratt was rendered unable to speak. (Tr. 321, line 5). She had to walk Mr. Pratt to the bathroom and, when he was unable to even do that, it fell to Ms. Pratt to help her husband urinate in a bottle. (R. p. 339, lines 15-21). She watched on helplessly as his breathing worsened. (R. p. 500, lines 16-24). As this seemingly interminable 2-day period wore on, Ms. Pratt noticed her husband's urine bottle started to fill with blood instead. (R. p. 339, line 24 – p. 340, line 4).

Rock Hill Radiology and Dr. Gilleland contend that none of these things count toward Ms. Pratt's loss of consortium damages. They press the somewhat callous conclusion that Ms. Pratt would have suffered losses regardless of their misconduct and all her alleged damages are actually just an inescapable result of the fall that caused Mr. Pratt's rib injury. (Appellants' Br. at 16, 19). But, that misguided conclusion springs from a false assumption addressed in Argument No. 1 above. The possible outcomes for Mr. Pratt were not two days suffering at home or two days of the same suffering in a hospital. Hospitalizing Mr. Pratt in a trauma unit on March 2nd would have offered Mr. Pratt immediate access to five treatment modalities which, as Dr. Shah described, would produce immediate improvements in Mr. Pratt's level of discomfort and coherence. (R. pp.

368-71). It is unreasonable for Rock Hill Radiology and Dr. Gilleland to argue the aid, comfort, and support Mr. Pratt could not offer his wife as he lay unaided by doctors on his couch at home would be equally lacking had he been in a hospital setting receiving aggressive therapy to reduce his pain and improve his breathing. Rock Hill Radiology and Dr. Gilleland point to no evidence in the record to support such an ill-conceived causation theory.

Similarly, the Court should reject Rock Hill Radiology and Dr. Gilleland's insistence that Ms. Pratt's loss of consortium claim is limited to the two-day period between Mr. Pratt's PMC discharge and CMC-Pineville diagnosis. Regardless of whether Rock Hill Radiology and Dr. Gilleland's errors ultimately caused Mr. Pratt's death, the evidence shows their misconduct deprived him of the improvement in his condition that immediate hospital care would offer. Thus, even after Mr. Pratt was properly diagnosed and began treatment within CMC facilities, the effect of his unchecked decline in health to that point continued to negatively affect his ability to carry on the loving relationship he had so long enjoyed with his wife. The jury was not required to restrict their deliberations on this claim to an isolated 48-hour period.

Rock Hill Radiology and Dr. Gilleland's final argument is that a $ 640,000 loss of consortium award was just too much under these circumstances. However, valuing the intangible losses that comprise a loss of consortium claim is a uniquely important role of the jury that has had the chance to directly hear the evidence and observe the witnesses. Plus, there is nothing in this jury's award for intangible loss that is out of bounds with those awarded by other South Carolina juries. In Cohen v. Allendale Coca-Cola Bottling Co., the court found a verdict was not excessive even though the damages awarded were one thousand times the plaintiff's medical expenses, there was no physical impairment or lost wages, no testimony from medical providers, and the plaintiff endured at most a few hours of nausea and diarrhea. 291 S.C. 35, 39, 351 S.E.2d

897, 899-900 (Ct. App. 1986). Similarly, in Scott v. Porter, the court affirmed a $ 600,000 verdict for survival damages for a child whose conscious pain and suffering covered less than a two-day period and where the plaintiff's evidence showed only $85 in medical bills. 340 S.C. 158, 170-71, 530 S.E.2d 389, 395-96 (Ct. App. 2000). Scott found large awards for relatively short periods of suffering was consistent with rulings from other jurisdictions. Id. (citing New Prospect Drilling Co. v. First Commercial Trust, N.A., 966 S.W.2d 233 (Ark. 1998) (affirming $ 1 million in survival award for pain and suffering during period between when motor vehicle collision occurred and when paramedics arrived) and Holston v. Sisters of the Third Order of St. Francis, 650 N.E.2d 985 (Ill. 1995) (affirming $ 1 million in survival award for pain and suffering over period of several hours before patient slipped into coma).

Finally, to have this damage award declared "grossly excessive" Rock Hill Radiology and Dr. Gilleland have to show the circumstances in which it was entered suggests the jury was motivated by passion or prejudice. Elam, 361 S.C. at 27, 602 S.E.2d at 781. Rock Hill Radiology and Dr. Gilleland do not point to anything from the trial to support that conclusion. In fact, the verdicts show the jury acted with substantial restraint. Having found reckless/grossly negligent misconduct, the jury deliberated again (R. p. 798), this time offered the chance to punish Rock Hill Radiology and Dr. Gilleland. The jury declined the opportunity, and no punitive damages were awarded. (R. p. 5).

In short, the circuit court correctly refused to grant a new trial based on the amount of the loss of consortium award. The jury carefully considered the evidence in evaluating what Ms. Pratt lost, and the circuit court properly exercised its discretion in finding that award was not grossly excessive. The award is in line with other verdicts for short periods of intangible losses, and there is nothing in the record to suggest the jury was motivated by passion or prejudice.

5. Hospital policy and expert testimony show Rock Hill Radiology and Dr. Gilleland's grossly negligent or reckless misconduct.

The jury heard multiple experts testify Dr. Gilleland ignored evidence that Mr. Pratt's nine non-displaced rib fractures were recent, acute injuries and ignored the very significant discrepancy from the initial interpretation of the chest CT on which Mr. Pratt's treatment providers relied when they discharged him. Yet, Dr. Gilleland refused to simply call the PMC emergency room to bring this discrepancy to light. Dr. Gilleland told jurors he did not make the call, in part, because he thought he knew better than Mr. Pratt's attending physician what information was important to his treatment. In truth, Dr. Gilleland's failure to make the call violated PMC policy and cannot be excused as mistaken clinical judgment. Therefore, the circuit court correctly submitted the gross negligence/recklessness question to the jury and denied JNOV.

A directed verdict or JNOV is not proper where any evidence supports Rock Hill Radiology and Dr. Gilleland's gross negligence or recklessness. Rogers, 356 S.C. at 92, 588 S.E.2d at 90; see also Bass v. S.C. Dep't of Soc. Servs., 414 S.C. 558, 780 S.E.2d 252 (2015) (addressing directed verdict/JNOV on gross negligence and stating that a "trial judge is concerned with the existence of evidence, not its weight").[6] Recklessness is the "conscious failure to exercise due care." McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). Gross negligence, a lesser culpability standard, is a "relative term" meaning "the absence of care that is necessary under the circumstances" or "the failure to exercise slight care." Jinks v. Richland County, 355 S.C. 341,

[6] Rock Hill Radiology and Dr. Gilleland argue Ms. Pratt's case lacked clear and convincing evidence of gross negligence or recklessness. (Appellants' Br. at 19). The evidence described below meets this elevated evidentiary standard. More importantly, Ms. Pratt need not meet that standard to prevail in this appeal. While clear and convincing evidence is the threshold for punitive damages, only a preponderance of evidence supporting gross negligence or recklessness is required to avoid the statutory limitation on noneconomic damages. Compare S.C. Code Ann. § 15-32-520(D) with S.C. Code Ann. § 15-32-220(E). Since the jury chose not to award punitive damages, the clear and convincing evidence standard is not relevant here.

345, 585 S.E.2d 281, 283 (2003). The issue of gross negligence "is a mixed question of law and fact" that should generally be resolved by a jury. Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

A number of factors may be considered to determine whether a defendant's conduct rises from ordinary to gross negligence. Cole v. S.C. Elec. & Gas, Inc., 335 S.C. 183, 193, 584 S.E.2d 405, 411 (Ct. App. 2003) (holding that a jury determining gross negligence may consider statutory and regulatory violations as well as "other facts and circumstances surrounding the event"). A violation of operational policies can be strong evidence of gross negligence. Proctor v. S.C. Dep't of Health & Envtl. Control, 368 S.C. 279, 297, 628 S.E.2d 496, 506 (Ct. App. 2006) (finding jury question on gross negligence where state agency's conduct was against what "was its policy to do"); Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 384-85, 608 S.E.2d 573 (2005) (holding that trial court properly submitted gross negligence to jury based in part on an expert description of department policy). Expert testimony can establish gross negligence and a directed verdict/JNOV on gross negligence is not appropriate just because a defendant offered some evidence of slight care in some parts of its conduct. Bass, 414 S.C. at 573-74, 780 S.E.2d at 260.

The evidence showed several factors that took Rock Hill Radiology and Dr. Gilleland's misconduct beyond ordinary negligence. First, Mr. Pratt's rib fractures were an overtly acute injury. Ms. Pratt's radiology expert Dr. Lupetin walked jurors through a proper read of Mr. Pratt's March 2nd chest CT. The right rib injury showed unmistakable signs of "buckle" fractures, exhibited by bent lines outlining the effected ribs. (R. p. 182, lines 14-23). "Buckling" is a distinct sign of a recent, acute injury. (R. p. 182, line 24 – p. 183, line 4). Viewed as a whole, Mr. Pratt's chest CT showed multiple "acute buckle fractures" and "[t]here's nothing subtle about that." (R. p. 184, lines 18-20). Not only did the chest CT clearly point to acute injury it also clearly dispelled

any notion that the injury might be old (i.e. chronic). Dr. Lupetin explained how, over time, a fracture heals by forming new bone or callus that looks a bit on a CT like a knot around the affected rib. Here, the CT had no evidence of new bone formation which would foreclose the possibility that these were old fractures. (R. p. 183, lines 17-18) ("these are absolutely acute buckle fractures with no signs of chronicity").

Second, since the CT so clearly showed an acute injury, the erroneous Virtual Radiology interpretation used to discharge Mr. Pratt from the hospital was a huge discrepancy Dr. Gilleland simply could not leave uncommunicated. This was true from both a radiological and emergency medicine perspective. Dr. Lupetin told jurors the disparity was "very significant" and, as an emergency medicine expert, Dr. Chansky agreed the disparity was "major." (R. p. 178, line 18; R. p. 258, line 22 – p. 259, line 1). Third, Dr. Gilleland's error went beyond ordinary negligence because failing to call in the discrepancy under these circumstances violated hospital policy. PMC's corporate representative and chief of radiology Dr. Bruce Leonard testified that the standard of practice at the hospital required a radiologist to call the emergency room if a chest image showed rib injuries that were acute *or* where "the radiologist is unsure of their acuity." (R. p. 186, line 21 – p. 187, line 9). Dr. Varaly, the emergency room physician who treated Mr. Pratt, agreed this was PMC's policy. (R. p. 188, lines 3-21; R. p. 561, line 22 – p. 562, line 12). In his deposition testimony presented at trial, Dr. Gilleland testified that he was unsure whether the rib injury on Mr. Pratt's March 2nd chest CT was acute. (R. p. 190, lines 4-9) ("I did not know"). Thus, Dr. Gilleland's failure to call the emergency room violated established hospital policy.

Fourth, the evidence rejects Dr. Gilleland's attempts to mitigate his error by calling it mistaken "clinical judgment." (Appellants' Br. at 19). Since the injury was overtly acute, the discrepancy was so significant, and hospital policy provided clear direction, calling the emergency

room was not a judgment call, it was "what has to be done." (R. p. 191, line 22 – p. 192, line 1). It is no excuse for Dr. Gilleland to argue he just did not consider Mr. Pratt's rib injury to be significant because, given the circumstances and the policy mandate, "[h]e doesn't have the right not to call because of his personal opinion." (R. p. 194, lines 9-10). Fifth, the jury could easily perceive a cold indifference in how Dr. Gilleland handled Mr. Pratt's case. He admitted that, when reviewing Mr. Pratt's scan, he "expected [Mr. Pratt] to become a hospice patient." (R. p. 680, lines 19-23). Dr. Gilleland also seemed to imply he did not communicate the discrepancy to the emergency room because he felt he knew more than Dr. Varaly on the degree and significance of Mr. Pratt's injury. (R. p. 678, lines 14-15; R. p. 679, line 17) ("He doesn't know what I know" and "I am more qualified"). There was certainly evidence from which the jury could deduce Dr. Gilleland's error was a product of valuing his own opinion too much and in valuing the quality of Mr. Pratt's life too little.

Rock Hill Radiology and Dr. Gilleland then argue the circuit court erred in permitting Dr. Lupetin to use the word "reckless" in his testimony. (Appellants' Br. at 20-21). However, medical experts are not limited to explaining medical terms or describing medical treatment. They may offer conclusions on the propriety of a treatment provider's conduct and, where necessary, the egregiousness of a provider's error. Rule 704, SCRE ("An opinion is not objectionable just because it embraces an ultimate issue"). Rule 704 does not authorize experts to offer legal conclusions because it is the Court's role to define the law and the jury's duty to apply it to the facts presented at trial. Hermitage Indus. v. Schwerman Trucking Co., 814 F. Supp. 484 (D.S.C. 1993) (citing Adalman v. Baker, Watts & Co., 807 F.2d 359, 366 (4th Cir. 1986)). However, an expert's use of a term with legal significance does not inevitably qualify as a legal conclusion. Many terms the

law has adopted to describe tort elements or culpability standards are routinely used outside the legal arena and have a universally accepted meaning.

Hermitage recognized the somewhat subtle distinction between legal conclusions and permissible expert testimony. 814 F. Supp. at 486 (citing Owen v. Kerr—McGee Corp., 698 F.2d 236 (5th Cir. 1983) and Haney v. Mizell Mem'l Hosp., 744 F.2d 1467, 1473 (11th Cir. 1984)). Testimony using a "legal" term is only an impermissible legal conclusion when it has a "separate, distinct and specialized meaning in the law different from that present in the vernacular." Hermitage, 814 F. Supp. at 486-87 (quoting Torres v. Cnty. of Oakland, 758 F.2d 147, 150 (6th Cir. 1985)). Thus, when a term, though common in legal parlance, has a universally accepted meaning, an expert may use it in stating his opinions.

Applying these principles, Dr. Lupetin could use the term "reckless" in his testimony. Recklessness is a concept used in everyday language and means the same thing in the law as in other contexts. U.S. v. Perkins, 470 F.3d 150,158 (4th Cir. 2006) (citing U.S. v. Sheffey, 57 F.3d 1419, 1426 (6th Cir. 1995) (testimony that the defendant had driven 'recklessly, in extreme disregard for human life," did not state a legal conclusion because the terms "recklessly" and "extreme disregard for human life" "do not have a legal meaning distinct from everyday usage")); see also Fortner v. Hansen, Case No. 16-2672-CM, 2017 WL 4882659, at * 4 (D. Kan. Oct. 30, 2017) (admitting testimony on "willful" and "reckless" conduct because, while these are legal terms, they were not legal conclusions because the expert used them "to convey his view of the severity of [a party's] conduct from a construction safety perspective").

Alternatively, even if Dr. Lupetin should have been barred from using the word "reckless," the perceived error would not support a new trial. Rock Hill Radiology and Dr. Gilleland must show both an error and prejudice to support their motion. See Steele, 327 S.C. at 343, 486 S.E.2d

at 279. There is no prejudice here because Dr. Lupetin's aggregate testimony showed Dr. Gilleland's interpretation of the discrepancy and his decision not to contact the emergency room went far beyond ordinary negligence. Plus, Dr. Leonard's testimony suggested Dr. Gilleland consciously disregarded a well-known policy by taking it upon himself to consider the likely impact on Mr. Pratt's treatment course when determining how to respond to the discrepancy. Dr. Gilleland's failure to identify Mr. Pratt's injury as acute and his callous failure to report the discrepancy support a finding of recklessness whether Dr. Lupetin used the word "reckless" or not.

6. The circuit court correctly refused to reduce the verdict under the South Carolina Noneconomic Damage Awards Act of 2005.

Ms. Pratt is entitled to judgement on the entire $ 1 million awarded by the jury. The South Carolina Noneconomic Damage Awards Act of 2005's ("the Act") plain terms do not permit reducing the verdict the jury entered. The Court need not even reach Rock Hill Radiology and Dr. Gilleland's statutory interpretation and constitutional arguments because they depend almost entirely on an invalid attack on the jury's gross negligence/recklessness finding discussed in Argument No. 5 above. The statutory and constitutional arguments also fail on their merits because they misapply or ignore basic statutory construction rules.

The jury's answer to the verdict form's Question No. 4 should foreclose Rock Hill Radiology and Dr. Gilleland's arguments to reduce the verdict under the Act. The jury unanimously determined both Rock Hill Radiology and Dr. Gilleland committed reckless or grossly negligent misconduct. (R. p. 4). By its plain language, the Act's damage limitation provisions do not apply when a medical malpractice defendant is guilty of these enhanced levels of culpability. S.C. Code Ann. § 15-32-220(E). As discussed above, the jury's finding of gross negligence and recklessness is supported by the overtness of Mr. Pratt's acute rib injury on his March 2nd chest CT, the degree of the discrepancy Dr. Gilleland failed to communicate to the

PMC emergency room, and the hospital policy Dr. Gilleland disregarded when he chose not to make that call.

Without meeting their burden to overturn the gross negligence and recklessness verdict, Rock Hill Radiology and Dr. Gilleland can only invoke the Act by prevailing on their argument that the verdict failed to determine their errors proximately caused Ms. Pratt's noneconomic damages. (Appellants' Br. at 21-22) (citing S.C. Code Ann. § 15-32-220(E)). That argument is based on a wholly unreasonable interpretation of the verdict form. The jury unambiguously answered "yes" when asked whether Rock Hill Radiology and Dr. Gilleland's conduct was grossly negligent and reckless. (R. p. 4, Question No. 4). The jury also answered "yes" to the sole proximate cause question it was asked, unambiguously stating their finding of a proximate connection between Rock Hill Radiology and Dr. Gilleland's conduct and all the damages the jury chose to award. (R. p. 3, Question No. 2). The jury then awarded a total of $ 1 million in damages on Ms. Pratt's survival and loss of consortium claims. (R. p. 4, Question 3). All of those damages were necessarily noneconomic as the circuit court had earlier awarded a directed verdict on any claim for economic loss. (R. p. 513).

Rock Hill Radiology and Dr. Gilleland seem to argue the verdict fails to meet the section 15-32-220(E) requirements because its proximate cause finding does not explicitly reference noneconomic damages. (Appellants' Br. at 22). But, a proximate connection is reasonably and necessarily inferred from the very fact that the jury chose to award noneconomic damages. Jurors were repeatedly told they could award damages only if they first found a proximate connection between the misconduct and injury. (R. p. 772) (instructing jury that, to find for Ms. Pratt on loss of consortium, jury must find "damages to the Plaintiff resulting from the spouse's injuries"); Id. (charging jury that it should go on to the damages question on the consortium claim only "[i]f you

find that the Defendants' conduct resulted in the Plaintiff's loss of consortium"). The circuit court reiterated this point when explaining the verdict form (R. pp. 777-78). The jury followed the circuit court's instructions by finding for Ms. Pratt on proximate cause (R. p. 3, Question No. 2) and only then turning to awarding her damages.

Assuming for the sake of argument that section 15-32-220(E) did not render the Act's damage limitations inapplicable, the Court should still reject Rock Hill Radiology and Dr. Gilleland's motion to reduce Ms. Pratt's recovery to $431,865. Since final judgment was entered against two "health care providers," the Act's plain language entitles Ms. Pratt to the cap amount "for *each* . . . health care provider." S.C. Code Ann. § 15-32-220(C). When final judgment was rendered in 2020, the cap amount was $ 472,625 for each health care provider. See S.C. State Register published Feb. 28, 2020. Rock Hill Radiology and Dr. Gilleland challenge both the number of "health care providers" against whom judgment was entered and which year's cap amount applies to the judgment. Neither argument is supported by precedent and both fail to properly apply South Carolina statutory interpretation principles.

Rock Hill Radiology and Dr. Gilleland each qualify as a "health care provider" under the Act. Section 15-32-210(5) states that a "physician" like Dr. Gilleland is a "health care provider" and a "health care practice" such as Rock Hill Radiology independently qualifies as a "health care provider." Since the statutory language is clear, the analysis must end there. Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). The Court must grant these terms their plain and ordinary meaning and additional statutory interpretation principles are simply not needed. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Rock Hill Radiology and Dr. Gilleland disregard these principles and ask the Court to interpret "health care provider" not solely by turning to its statutory definition but in reference to an unrelated statute in an entirely different chapter.

(Appellants' Br. at 24) (citing S.C. Code Ann. § 15-38-15(C)(3)(a)). Not only is it improper to go beyond section 15-32-210(5)'s plain definition of "health care provider," resort to section 15-38-15 is improper because the two statutes do not serve the same legislative aims. While the Act is intended to limit a medical malpractice plaintiff's noneconomic damage recovery in some instances, section 15-38-15(C) is meant as an alteration of traditional joint and several liability principles in many types of personal injury actions. While the former limits recovery, the latter focuses on who among multiple defendants must pay judgments and in what proportions. Moreover, section 15-38-15 cannot be used here because its provisions may not be invoked in any respect by a party found guilty of gross negligence or reckless misconduct. S.C. Code Ann. § 15-38-15(F); (R. p. 4, Question No. 4).

When Rock Hill Radiology and Dr. Gilleland turn to the statutory definition of "health care provider," their proposed interpretation ignores key language. They argue that since both Dr. Gilleland ("physician") and Rock Hill Radiology ("health care practice") are included within the scope of the definition, then they no longer stand as independent entities and must be considered a single "health care provider." (Appellants' Br. 26-27). Rock Hill Radiology and Dr. Gilleland insist section 15-32-210(5)'s use of "including" means section 15-32-220's use of "single health care provider" encompasses both a doctor and the medical practice by whom he is employed. Id. None of the definitions of "including" offered in their brief supports the interpretation they offer. While it is true that "health care practice, association, partnership, or other legal entity" is *illustrative* of the phrase "licensed health care provider," that does not mean "physician" and "licensed health care provider" collapse into one. Taken to its logical end, this argument would mean that all of the individuals/entities listed in 15-32-210(5) must be a single "health care provider." That would lead to an absurd result by collapsing every "physician, surgeon, osteopath,

nurse," etc. into a single "health care provider" and fatally undermining the Act's stated objective of allowing a claimant to recover multiple cap amounts from multiple defendants. S.C. Code Ann. § 15-32-220(C); see also Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) (holding that courts will reject proposed statutory interpretations producing absurd results); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) (finding that statutory terms must be construed in context and their meanings determined by looking at other terms used in the statute).

Additionally, Rock Hill Radiology and Dr. Gilleland contend that, by labeling them as separate "health care providers," section 15-32-210(5) denies them due process and equal protection under the law as protected by the South Carolina and federal constitutions. Yet, as Rock Hill Radiology and Dr. Gilleland admit, they are not members of a protected class and their constitutional argument implicates no fundamental right. Therefore, the Act's definition of "health care provider" is constitutional so long as there is any rational basis for it. Lee v. S.C. Dep't of Natural Res., 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). Rock Hill Radiology and Dr. Gilleland argue that treating a physician and medical practice as separate entities for liability purposes is irrational because it must be a product of legislative animus toward physicians who join with others to form a medical practice rather than working on their own. (Appellants' Br. at 28-29).

However, there is a perfectly rational reason for treating physician and practice as distinct defendants—they can perform medical malpractice in distinct ways. This case presents a perfect example. Rock Hill Radiology, which agreed to provide 24/7 radiology services, bears responsibility for the negligently performed interpretation of Mr. Pratt's March 2nd chest CT which it delegated to Virtual Radiology. Dr. Gilleland erred in a distinct way by recklessly failing to call the emergency room to bring the erroneous interpretation to the attention of Mr. Pratt's

attending physician. Distinct errors should lead to distinct liability, and the Act's recognition of Rock Hill Radiology and Dr. Gilleland as distinct actors is a rational assertion of this basic principle.

Finally, Rock Hill Radiology and Dr. Gilleland err in arguing Ms. Pratt's recovery is governed by the 2015 cap number. (Appellants Br. at 30-31). On this point, they simply ignore the statute's plain language. Any limitation on a medical malpractice plaintiff's recovery of noneconomic damages is measured from "when final judgment is rendered . . . ." S.C. Code Ann. § 15-32-220 (A)-(C). Final judgment was rendered in this case when the circuit court denied all post-trial motions on June 25, 2020. (R. p. 15-17). Thus, the 2020 cap figure of $ 472,625 per health care provider applies to the recovery of each "claimant."

In conclusion, the circuit court correctly refused to reduce Ms. Pratt's noneconomic damages recovery. The Act does not apply here because the jury found Rock Hill Radiology and Dr. Gilleland were both guilty of gross negligence/recklessness and those findings are supported by competent evidence. Even if the Act could be invoked, the Act's plain language rejects Rock Hill Radiology and Dr. Gilleland's statutory arguments.

7. The circuit court properly determined a set-off based on the court-approved allocation of settlement funds.

The circuit court granted Rock Hill Radiology and Dr. Gilleland a set-off of $ 166,666.66 as credit for Ms. Pratt's intra-trial settlement with former codefendant PMC. The circuit court properly exercised its discretion in determining the set-off amount as it was based on a fault allocation specified in the order approving Ms. Pratt's settlement with PMC.

A set-off belongs to the Court's inherent power in the exercise of its equitable jurisdiction. Church v. McGee, 391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011). Rock Hill Radiology and Dr. Gilleland's pursuit of a set-off must be limited to that portion of the settlement representing the

claims on which judgment was entered against them (i.e. survival and loss of consortium). Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). The circuit court properly exercised its equitable power here by granting a set-off of $ 83,333.33 (survival) and $ 83,333.33 (loss of consortium) for Ms. Pratt's settlement with PMC. (R. p. 12). These figures were derived from the circuit court's earlier order allocating 33.33% of the PMC settlement to each of Ms. Pratt's survival, loss of consortium, and wrongful death claims. (R. pp. 7-11).

Rock Hill Radiology and Dr. Gilleland seek to increase the set-off amount by arguing more of the PMC settlement should have been allocated to the survival and loss of consortium claims. (Appellants' Br. at 32). This argument overlooks the fact that, under South Carolina law, nonsettling defendants like Rock Hill Radiology and Dr. Gilleland are not permitted to dictate the allocation of funds among various claims in a settlement reached by Ms. Pratt and a former co-defendant. Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) (adopting the analysis from Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1018 (Ill. App. 2009)). Riley recognized that "[s]ettlements are not designed to benefit nonsettling third parties" and "[i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle." Id. Since Rock Hill Radiology and Dr. Gilleland "failed to bargain" a settlement with Ms. Pratt, they are not to be "rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who [did]." Id.

Plus, Rock Hill Radiology and Dr. Gilleland incorrectly argue the circuit court's set-off is at odds with an "original agreement" on allocation of the PMC settlement among Ms. Pratt's three claims. (Appellants' Br. at 32). The only agreement on allocation was the 33.33% allocation among all three claims that was stated in Ms. Pratt's petition for settlement approval and deemed "fair and reasonable" in the circuit court's order approving the PMC settlement. (R. pp. 46-51).

Rock Hill Radiology and Dr. Gilleland note there was some "suggest[ion]" of a different allocation around the time the PMC settlement was being negotiated during the trial. (Appellants' Br. at 32). However, the trial transcript says nothing about allocation. Instead, the circuit court told the settling parties that the settlement's specifics would be finalized later. (R. p. 565, lines 16-18) ("we will have an approval hearing in front of me sometime in the next few days").

Therefore, the circuit court properly exercised its equitable power in granting a set-off of $ 83,333.33 each for the survival and loss of consortium claims. Rock Hill Radiology and Dr. Gilleland have no right to seek a different allocation of settlement funds for an agreement to which they were not parties.

CONCLUSION

Based on the arguments stated above, Ms. Pratt respectfully requests the Court affirm the circuit court's rulings in full. Rock Hill Radiology and Dr. Gilleland were not entitled to a directed verdict or JNOV on Ms. Pratt's substantive claims or the issue of whether their misconduct rose to gross negligence/recklessness. Expert opinions, lay witnesses, and the medical records presented at trial supported the jury's findings on these issues. The verdict form challenges raised below should also be rejected both because they were not properly preserved for review and are not supported by South Carolina law. Finally, Rock Hill Radiology err in their challenges to the amount of the judgment against them. The jury's loss of consortium award was a reasonable assessment of the kind of losses South Carolina law confers to the jury's discretion. Finally, Ms. Pratt can collect the full amount of her noneconomic damages (less the set-off) because the Act does not apply to the grossly negligent/reckless misconduct here, and Rock Hill Radiology and Dr. Gilleland's statutory arguments improperly construe the Act's key provisions.

Respectfully submitted,

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August 19, 2022
Rock Hill, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2020-000838

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 the	…….	Appellants.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Respondent's counsel hereby certifies that her final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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