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.

REPLY BRIEF

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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 directed verdict and JNOV arguments made by the Appellants Geoffrey T. Gilleland and Rock Hill Radiology Associates, LLC are premised on the element of proximate cause. In her response brief, the Respondent Rita Pratt misconstrues or deliberately deflects any real discussion of the Appellants' proximate cause argument. That argument is based on the jury's verdict. The Respondent does not dispute that the jury returned a defense verdict on the wrongful death claim. Important to this discussion, 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. 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. The Appellant sidesteps and never addresses this very issue.

The Respondent nonetheless does not dispute the obvious -- that the Appellants did not cause and are not liable for the decedent's nine displaced rib fractures. The Respondent also does not dispute that her theory of liability at trial was that the decedent should have been admitted to the hospital on March 2, 2015 rather than March 4, 2015. The Respondent, however, never addresses how the decedent's rib injury would have been treated differently if he had been admitted on March 2, 2015. Instead, she addresses only how his *pulmonary* condition worsened from March 2, 2015 until he was hospitalized on March 4, 2015. However, to reiterate, the verdict shows that the jury rejected the Respondent's theory of liability -- that the delay in hospitalization caused the

development of pneumonia that ultimately caused the decedent's death. There is no other way to interpret the defense verdict on the wrongful death claim. Importantly, the Respondent never shows that the non-displaced rib fractures -- as opposed to the pulmonary issues -- would have been treated any differently if the decedent had been admitted on March 2, 2015. That is the dispositive issue. The Appellants are not charged with a failure to identify any pulmonary injury on the x-ray read by Dr. Gilleland.

In sum, in an attempt to justify the jury's verdict, the Respondent ignores the proximate cause issue that is actually before the court. It is immaterial that the decedent's pulmonary condition may have worsened from March 2, 2015 until March 4, 2015, because the jury found that the Appellants' negligence did not proximately cause that condition which led to the development of pneumonia and the decedent's death. To reiterate, if the jury had found proximate cause as to the pulmonary condition, it would have returned a verdict for the Respondent on the wrongful death claim. That did not occur. The Appellants are, therefore, entitled to a JNOV on the survival and loss of consortium claims based on the jury's determination on the proximate cause issue.

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.

The Respondent also mischaracterizes the Appellants' second argument on appeal which is expressly presented in the alternative. The Appellants specifically preface that argument by writing, "Alternatively, if the Court concludes that the defense verdict on the wrongful death claim was not based on the issue of proximate cause …" *See*, Appellants' Opening Brief, p. 10. In effect, the Appellants argue that, in the event the Court concludes that the defense verdict on

the wrongful death claim is not based on the absence of proximate cause, then the Court should grant a new trial absolute because the verdict is ambiguous and shows jury confusion.

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

Additionally, the Respondent's *post hoc* attempt to explain the defense verdict on the wrongful death claim falls flat. The Respondent suggests that the jury did not find that she had

proven wrongful death damages. That is inconceivable on this record. As the Appellants previously explained, 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. Thus, based on this record, it is illogical to conclude that the Respondent individually proved a loss of society, support, and companionship before death 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.

Finally, the Respondent insists that any challenge to an inconsistent verdict has been waived by the discharge of the jury. That would be true for both sides. The Respondent must live with the defense verdict on the wrongful death claim, including the inevitable and only reasonable conclusion that the jury found an absence of proximate cause for the decedent's death. Yet, as an alternative and in the interest of due process and fundamental fairness, this Court has the power to order a new trial absolute where the verdict "is so confused that the jury's intent is unclear [and] the safest and best course is to order a new trial." *Vinson v. Jackson*, 327 S.C. 290, 491 S.E.2d 249, 250 (1997). The Supreme Court in *Vinson* recognized that a new trial absolute is the best approach when "[t]he verdict is internally inconsistent and unexplainable," even if the parties did not challenge the verdict before the jury is discharged. *Id*. The

Respondent suggests, nonetheless, that *Vinson* is not binding precedent from the Supreme Court. However, *Vinson* has never been overturned, and as recently as 2021, this very Court cited it as binding precedent. *See*, *Encore Technology Group, LLC v. Trask*, 436 S.C. 289, 871 S.E.2d 608, 618 (Ct. App. 2021) (this Court cited *Vinson* as "explaining the court's job after a trial is to carry out the jury's intent and that the court should reverse a verdict that is internally inconsistent and unexplainable"). Consequently, if this Court comes to the conclusion that the jury's verdict is "inconsistent and unexplainable" or that the jury was clearly confused in completing the verdict form, the Court may certainly declare a new trial absolute in accordance with the *Vinson* decision.

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 and, more importantly, in upholding an allocation of ten percent fault to the practice which may only be held vicariously at fault based on this record. The Respondent responds by arguing that the Appellants did not object to the verdict form. However, the verdict form notwithstanding, the Appellants may certainly argue in post-trial motions and on appeal for a new trial absolute because the ten percent allocation of fault to Rock Hill Radiology Associates is unsupported by the evidence or the law of the case.

The controlling law of the case is fully dispositive of this issue. The Respondent cannot show that she pled or properly pursued a direct liability claim against Rock Hill Radiology Associates. Instead, to justify the verdict after the fact, the Respondent relies entirely on a non-delegable duty theory as recognized in *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32,

533 S.E.2d 312 (2000). The Respondent claims that Rock Hill Radiology Associates is liable for the acts and omissions of a different radiology provider, Virtual Radiology, based a non-delegable duty and a principle-agent relationship. The Respondent points to excerpts from the transcript where she continuously tried to argue that the practice was liable for the acts and omissions of Virtual Radiology. The trial court, however, never ruled that the Respondent could pursue an agency or non-delegable duty claim. In fact, each time the issue arose -- even as an objection to the jury instructions -- the trial judge consistently disallowed that theory of liability to be pursued. (R. 780). The trial court even sustained objections on the issue during closing argument. (R. 752). There is no question that the Respondent's attempt to assert a direct liability claim presented an ongoing struggle throughout the trial as the Respondent's counsel repeatedly disregarded the court's rulings, and there were also colloquy between counsel that demonstrated confusion on the issue.

But what is not confusing in the record and what is dispositive of this issue is the jury charge itself. That demonstrates beyond dispute that the trial judge did not allow a direct liability claim against Rock Hill Radiology Associates to go to the jury. Not surprisingly, in her response, the Respondent never addresses the jury charge itself. She never shows that the jury was provided any instructions of law applicable to any direct liability claim that she now claims to have asserted against Rock Hill Radiology Associates. There are no instructions to the jury on a non-delegable duty theory. There are likewise no instructions on principle-agency law. The jury was not given any guidance as to any direct liability claim against the practice. The reason for that is obvious -- there was no such claim pled or tried or charged to the jury for its adjudication. In short, an unpled claim that the trial court did not allow to proceed and on which no instructions were given cannot be used after the fact to justify the verdict returned against Rock Hill Radiology Associates. The trial

court thus erred in refusing to reverse the direct liability verdict and allocation of fault to Rock Hill Radiology Associates and to grant a new trial absolute.

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.

In her response brief, the Respondent disputes that the award of actual damages of $640,000 on the loss of consortium claim was grossly excessive. In taking that position, it is important to first recognize that the Respondent has conceded the Appellants' argument that a loss of consortium claim does not include damages resulting from the spouse's death or extending beyond the spouse's date of death.[1] Therefore, the Respondent attempts to justify an award for loss of consortium that extends from March 2, 2015 through the date of the decedent's death on March 23, 2015. Importantly, the jury found for the Appellants on the wrongful death claim, which would be inclusive of consortium-type damages, i.e., the loss of services, society, and companionship, that accrued after the spouse's death. Therefore, at most, the loss of consortium award of $640,000 covers a total of 21 days, meaning the Respondent has received an award in excess of $30,000 per day.

In an attempt to justify such an exorbitant award, the Respondent appears to deliberately enlarge the elements of damages recoverable under South Carolina law for loss of consortium, and certainly elements of damages which the trial court never charged the jury. Of course, it should be

[1] That concession should result in a reversal of the trial court's order. The trial court refused to issue a formal order on the Appellants' post-trial motions and decided to rely on the arguments made by the Respondent as the basis for the denial of a new trial absolute. However, because the Respondent concedes that the Appellant is correct that loss of consortium damages are recoverable only through the injured spouse's death, that should also be deemed a concession that the trial court's reliance on the Respondent's contrary arguments at the trial court level was in error.

beyond debate that the law as charged by the trial court governs any review of the damages awarded.

S.C. Code Ann. § 15-75-20 provides: "Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the *companionship, aid, society and services* of his or her spouse." *See,* S.C. Code Ann. § 15-75-20. (Emphasis added). The Supreme Court has similarly held that "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). Thus, an award for loss of consortium is limited to the value of the lost or curtailed companionship, aid, society, and services provided by the injured spouse.

However, in attempting to justify the $640,000 award, the Plaintiff enlarges those elements to include the claiming spouse's "direct emotional or physical injury inflicted by the tortfeasor." *See*, Respondent's Brief, p. 26. She accomplishes that by misreading this Court's decision in *Stewart v. State Farm Mutual Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000), which was an insurance coverage declaratory judgment action where this Court addressed whether loss of consortium damages are part of a single "per person" limit under S.C. Code Ann. § 38-77-140. This Court drew a distinction between "consequential damages" recoverable in a loss of consortium claim and "direct damages" where the spouse is able to make a claim for her own "direct emotional or physical injury inflicted by the tortfeasor" such as what is recoverable in a bystander claim. 533 S.E.2d at 605.

Nonetheless, whether the Respondent misreads *Stewart* or not is immaterial. What governs is the law of the case, i.e., what the trial judge charged the jury. The trial judge charged the jury as follows: "Loss of consortium includes several elements; one, support and services

provided by the other spouse; two, love; three, companionship; four, affection; five, society; six, sexual relations; seven, comfort; eight, solace; nine, guidance." (R. 771). The trial judge never charged the jury that loss of consortium damages also include "direct emotional or physical injury inflicted by the tortfeasor." It is, however, quite telling that the Respondent feels the need to enlarge the definition of damages recoverable for loss of consortium beyond what was charged in her attempt to justify in excess of $30,000 per day of damages.[2]

The Respondent also attempts to justify the exorbitant amount of damages by citing to other cases where damages for *survival* claims, specifically physical pain and suffering awards, were upheld as not being grossly excessive. That is not a fair or reasonable comparator; loss of consortium claims do not compensate for pain and suffering. It is quite telling that the Respondent cites to no reported decision upholding an award of $30,000 per day for loss of consortium or anything remotely approaching that monetary figure.

Finally, in evaluating whether the $640,000 award is grossly excessive, the Court should place great weight on the fact that that consortium award is almost twice the amount awarded to the decedent for his pain and suffering over the same period of time. The decedent received $360,000 for 21 days of pain, suffering, and other non-economic harm. That alone shows that the loss of consortium award is exorbitantly high and must be based on considerations beyond the evidence. Moreover, while the Respondent argues that the decedent could not provide "aid, comfort, and support" while he lay on the couch at home for two days, there is no evidence that he would have provided any greater degree of such care to his wife had he been hospitalized beginning on March 2, 2015. The loss of "aid, comfort, and support" while hospitalized was not

[2] Notably, the Respondent also cites to a federal district court decision from Wisconsin in an attempt to broaden the elements of a loss of consortium claim under South Carolina law.

proximately caused by the Appellants' conduct, but by the fact that the decedent had been injured in a fall down a set of stairs, was already in declining health for unrelated reasons, and was required to be hospitalized.

In sum, there should be no question that the $640,000 in loss of consortium damages is grossly excessive and should not be permitted to stand.

V. The trial court erred in permitting Anthony Lupetin, M.D., the Respondent's expert radiologist, to testify that the conduct of the Appellants constitutes "recklessness," which is a legal conclusion drawn by applying law to the facts.

The trial court erred in permitting Dr. Anthony Lupetin, the Respondent's expert radiologist, to testify over objection that the Appellants' conduct constitutes "recklessness," which is a legal conclusion drawn by applying the law to the facts. 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. In her response brief, the Respondent attempts to justify or excuse that ruling by arguing that "recklessness" is not a legal term. However, if that were the case, it would not be necessary for the trial court to define the term for the jury. Yet, the trial court did charge the jury as follows:

> Recklessness is the knowing failure to exercise reasonable care under all of the surrounding circumstances. And act of recklessness, if it is committed in a manner and under circumstances which a person of ordinary reason and prudence would know would invade the rights of the injured person.

(R. 773). Obviously, Dr. Lupetin did not have the benefit of that definition or jury charge when he opined to the jury that the Appellants' conduct was "reckless." In fact, he offered that opinion by way of a leading question from Respondent's counsel, and no attempt was made to define or properly characterize the term "reckless" when the opinion was elicited. (R. 202).

The Respondent also suggests that the Appellants have not shown any prejudice from Dr. Lupetin's unsupported legal opinion. Clearly, prejudice has been demonstrated by the jury's conclusion as stated in the Verdict Form that "the Plaintiffs have proven by clear and convincing evidence that the Defendants acted recklessly, willfully or wantonly in their care and treatment of William Pratt." (R. 5). The finding of recklessness, willfulness, or wantonness greatly prejudices the Defendants because, if allowed to stand, the Appellants lose the benefit of the non-economic damages cap. *See*, S.C. Code Ann. § 15-32-220(E) ("The limitations for noneconomic damages rendered against any health care provider or health care institution do not apply if the jury or court determines that the defendant was grossly negligent, willful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damages"). Hence, clear prejudice has been shown.

Moreover, it is significant that Dr. Lupetin's unsupported legal opinion on "recklessness" is also inconsistent with his own opinions on the medical issues, thereby showing that he did not understand or know how to even apply the legal concept of "recklessness." Importantly, Dr. Lupetin agreed that chronic (i.e., not acute) rib deformities did not need to be reported. (R. 204). He 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).

In short, the trial court erred in failing to grant a JNOV or, at the very least, a new trial absolute based on the finding that the Appellants acted recklessly, willfully or wantonly and particularly in light of the inadmissible opinion testimony elicited from Dr. Lupetin.[3]

[3] The Respondent raises a new issue not raised below when she contends that she was not required to prove gross negligence or recklessness by clear and convincing evidence. *See*, Respondent's Brief, p. 30. The Respondent cannot challenge that standard at this juncture.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Geoffrey T. Gilleland, M.D. and Rock Hill Radiology Associates, LLC respectfully renew their 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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The Verdict Form, to which she did not object, asked the following: "Do you find that the plaintiffs have proven by *clear and convincing evidence* that the defendants acted recklessly, willfully, or wantonly in their care and treatment for William Pratt?" (R. 5). (Emphasis added). Hence, that was the standard applied by the trial court, and that is – right or wrong – the law of the case. *See, Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). Moreover, this finding by the jury also demonstrates that the jury was never asked to make a finding on gross negligence, and as a result, the verdict cannot be read as finding that the Appellants acted with gross negligence.

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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 Reply 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 Reply 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 Reply 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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